102 Frimley House
5 The Parade, High Street
Frimley, Surrey
GU16 7JQ
Tel: 01276 509306
Fax: 01276 761076
Email: info@labourproviders.org.uk
Website: www.labourproviders.org.uk

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IMPLEMENTATION OF THE AGENCY WORKERS DIRECTIVE

RESPONSE BY THE ASSOCIATION OF LABOUR PROVIDERS TO BIS CONSULTATION ON THE DRAFT REGULATIONS

Contacts

Mark Boleat, Chairman, Tel: 07770 441377, E-mail: mark.boleat@btinternet.com
David Camp, Director, Tel: 07855570007, E-mail: David@alliancehr.co.uk

Summary

On 15 October 2009 the Department for Business, Innovation and Skills (BIS) published a consultation (http://www.berr.gov.uk/consultations/page53060.html) seeking views on the implementation of the "Agency Workers Directive" (the Directive). Responses are required by 11 December 2009.

This is the second stage of the consultation process and is specifically seeking views on:

- The proposed response to issues arising from the previous consultation.
- Whether the draft Regulations (Annex A) effectively reflect the policy intentions.
- Whether the proposals, as reflected in the draft Regulations, give rise to any particular issues of concern.
- What practical advice users would welcome in the guidance.

The Government states that it is committed to an implementation that meets its twin objectives of bringing greater fairness for agency workers whilst maintaining the flexibility that the sector provides for both employers and workers.

The Association of Labour Providers (ALP) is the trade association for organisations that provide workers within the food, agricultural and other GLA sectors. The ALP represents over 250 labour provider businesses, all of whom will be directly affected by the application of the Directive. The ALP and its members therefore have a major interest in this consultation.

Within the food and agricultural sectors it is normal for temporary workers supplied by labour providers to be paid less than permanent workers doing the same job. The majority of workers supplied are paid minimum wage.

The food and agricultural supply chain is ultimately driven by cost competitiveness as retailers drive down the prices they are willing to pay to suppliers so to maintain profitability and market share.

Within this sector the Agency Workers Directive may well lead to a deterioration in the terms and conditions of the permanent employees of the food producers and suppliers as they seek to contain their cost base. This will offset improvement that agency workers obtain.

Responses to the Consultation

Interaction with the Gangmasters (Licensing) Act

In the drafting of final Regulations and associated guidance appropriate reference and consideration must be taken of and made to the separate Gangmaster legislation.

Throughout the consultation there are numerous references to the Conduct of Employment Agencies and Employment Businesses Regulations 2003 but none to the respective Gangmaster legislation, the Gangmasters (Licensing Conditions) Rules 2009.

Regulation 27 of the Gangmasters (Licensing) Act 2004 disapplies The Employment Agencies Act 1973 from the GLA regulated sector: "The Employment Agencies Act 1973 (c. 35) does not apply to an employment agency or an employment business in so far as it consists of activities for which a licence is required under this Act."

3. Scope of the Directive – who is covered

ALP agrees that the regulations:

- Should cover the activities of employment businesses and not employment agencies.
- Use the definition of 'worker' in the Working Time Regulations, adapted appropriately to allow for the tripartite nature of the agency.
- Apply to agency workers supplied via 'intermediaries' including umbrella companies, Master Vendor, Neutral Vendor and any similar 'chain' arrangements.
- Do not apply to people working on managed service contracts.

ALP comments that:

- The scope of the definition includes agency workers who operate a personal service company but are not genuinely self-employed but excludes workers who are genuinely self-employed or working through their own limited liability company.

  However, the Regulations fail to make a clear legal distinction between what is a "limited company contractor", what is a "personal services company" and what is to be regarded as genuinely or not genuinely self employed.

  The exclusion of limited company contractors allows a loophole that will be easily exploited by the unscrupulous. Currently, vulnerable agency workers, particularly Bulgarians and Romanians because of immigration restrictions, are engaged as limited company contractors. Under the regulations as proposed, because of the lack of clear legal distinction this model will be allowed to continue with workers paid gross at or around NMW to avoid holiday pay, NI and equal treatments. Such workers are engaged as cleaners or in other low skill roles and are clearly not in business in their own right. Such workers do not use the Courts and Tribunals to address their issues.

  The proposal that Guidance will be sufficient to address this loophole is unrealistic and we support the use of additional steps to prevent the unscrupulous from abusing these provisions in order to deny workers their equal treatment rights.

Simply, requiring agencies to make it clear to a worker the nature of the contract they are being offered before it is signed and its implications for their rights under the regulations is insufficient.

Exemption for Government Training Programmes

ALP agrees that use of the exemption be considered on a case-by-case basis.

4. Defining "Equal Treatment" under the Directive

Working Time and Holiday Entitlements

The draft regulations provide that after 12 weeks on an assignment an agency worker should be entitled to equal treatment in respect of pay, duration of working time, length of night work, rest periods and rest breaks, and annual leave.

The “basic working and employment conditions” to which equal treatment will apply will be those terms and conditions that “apply generally” through collective agreements, pay scales, contracts of employment, company handbooks or similar and other matters of custom and practice in the workplace concerned.

The ALP envisages innumerable practical difficulties and subsequent litigation with the interpretation and implementation of these requirements.

The Government states it is committed to maintaining the flexibility that the sector provides for employers. To demonstrate this commitment, the Regulations and guidance should be so constructed and provide clarity and practical advice to maintain this flexibility.

Specifically they should address:

- Whether equal treatment extends to the right for agency workers to be offered overtime on the same basis and with the same preference as permanent employees.

- How the Regulations will retain the opportunity to engage agency workers on different shift patterns and working hours arrangements to those of permanent staff to meet the needs of employers.

- What equal treatment in respect of “the duration of working time” actually means in practice.

On holiday entitlement the draft regulations provide that an agency worker should receive the same that he or she would have got if recruited directly to the same job and that must include any entitlement above the statutory minimum, including public holidays. There will be the option of payment in lieu of additional holiday (above the statutory minimum), either as a one off payment at the end of the assignment or as part of the hourly/daily rate, is permitted under the Working Time Regulations.

ALP comments that:

- The option of allowing rolled up holiday pay in lieu of additional holiday above the statutory minimum as an addition to the hourly rate will increase agency worker gross and net pay above that of permanent workers. This will limit the incentive when available for agency workers to transfer from temporary to permanent work.

Within the food sector the additional pay to agency workers will be resented by permanent workers. This could lead to industrial strife and racial tension in the workplace.

- There is a conflict between the requirement for equal treatment with regard to the draft Regulations and the payment rate at which holiday pay should be paid.

  This is due to the Employment Rights Act 1996 and the definition of how a "week's pay" should be calculated. Permanent employees tend to have normal working hours and thus a week's pay is calculated in accordance with s221-223. Agency workers tend to have no normal working hours and thus a week's pay is calculated in accordance with s224.

  The Regulations should be so constructed not to conflict and guidance should make clear how to comply with both pieces of legislation without breaching either.

The guidance should clarify:

- Whether equal treatment extends to the same rules for agency workers to be able to book and take holiday.

- Whether equal treatment extends to the same rules for agency workers to be able to carry over holiday from one holiday year to the next.

- Whether equal treatment extends to agency workers being treated the same as permanent workers within the priority in departmental holiday booking limits.

Pay

"Pay" will mean basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. This will include payment for overtime, shift allowances, unsocial hours' premiums/bonuses, payments for difficult or dangerous duties, and some commission payments and bonuses (though excluding those linked to organisational performance, performance appraisal or long-term management of staff).

ALP agrees:

- On the broad definition on bonus arrangements. This is as effectively already established by Evans v Malley Organisation t/a First Business Support [2003] ICR 432 (Evans v Malley) and May Gurney Ltd v Adshead & others [2006] UKEAT/0150/06/2607, 26 July 2006 (Gurney Ltd v Adshead),

- That in respect of overtime an agency worker would have to be doing work over and above standards hours to qualify – it would not be sufficient simply to be doing a shift that permanent staff tended to do on an overtime basis. It is noted that this will be made clear in guidance.

ALP comments:

- With regard to the statement "an agency worker performing the same role as a permanent employee for an extended period should also be entitled to equal treatment in respect of overtime payments, shift allowances and unsocial hours'

premiums/bonuses." With regard to permanent workers shift payments are paid as a reward for making a commitment to altering their lifestyle from the norm to fit these working hours. Agency workers may generally be required to work across all shifts and should not be so rewarded for working such shifts for a short period only. Such a distinction should be made clear in guidance.

Defining the 12–week qualifying period

The 12-week qualifying period will be 12 calendar weeks, regardless of working pattern. A new qualifying period will begin only if:

- There is a minimum six week break between assignments in the same job or
- A new assignment with the same employer is substantively different. The meaning of 'substantive' will be set out in guidance but the worker would have to commence a new, separate assignment with the hirer and will exclude mere changes of line manager but not duties, transfers between similar functions, or moves within a single, relatively small business unit.

Where an agency worker has served more than 12 weeks with a hirer and gained equal treatment rights, he or she would continue to enjoy them if returning within 6 weeks to a role with the same hirer that was not 'substantively different'.

Some legitimate absences from work will not count towards a break period:

- Annual leave approved by both hirer and agency, public duty/jury service and certified sick absence will 'pause the clock' on the qualifying period.
- The clock will 'continue to tick' in the event of maternity-related absence up to when the assignment would otherwise have ended at which point the clock would then 'pause'.
- Where agency workers are 'employees', the clock will 'continue to tick' during maternity, paternity or adoption leave.
- In long term sick absence or jury service being there will be a 'long-stop' provision that the clock is automatically 'reset' after 28 weeks.

ALP comments that:

- The six week break is unnecessarily long and does not strike the correct balance between bringing greater fairness for agency workers whilst maintaining flexibility. The food industry is characterised by ad hoc assignments. The additional administrative burden for employment businesses will be huge. Initially the ALP proposed that the break period in the first 12 weeks should be one week or the length of assignment, which ever is shorter. Once 12 weeks had been reached a longer break period of four weeks would apply.

  On consideration, to strike the correct balance, the break period in the first 12 weeks should be one week or the length of assignment, which ever is longer. Once 12 weeks had been reached a longer break period of four weeks would apply.

- The 12-week qualifying period continues where the agency worker is placed in substantively the same role but through different agencies. However as one

agency is highly unlikely to know that a worker has been placed in a broadly similar role by a different agency the responsibility should lie with the worker to inform the employment businesses in order for work done to contribute to the 12-week qualifying period. It is accepted that there is a need to prevent deliberate switching of workers between employment businesses with the same hirer for the purposes of evading the equal treatment regime. A Tribunal should still therefore be able to determine that there had been deliberate avoidance by the employment businesses even where the worker had not informed.

The guidance should clarify:

- Whether a breach of contract, for instance in the case of un-notified non-attendance at a previously accepted assignment, should have the effect of resetting the clock.

- Whether assignment to the same client on a broadly similar role but at a different department or location is substantively different.

- Whether a broadly similar role at the same client location but at a different pay rate is substantively different.

- Whether a period of retraining on a different role at the same client location would be regarded as making a role substantively different.

- Whether there is a duty to inform the worker that a new role at the same client will cause a break in the assignment prior to the worker accepting the assignment.

- Whether the following will be regarded as 'pausing the clock' or contributing to the 6 week break period:

    - Bereavement leave as afforded under 11.16 Agricultural Wages Order 2009;

    - Unpaid leave under 11.16 Agricultural Wages Order 2009;

    - Approved unpaid leave other than holiday;

    - Parental Leave and Emergency Dependency Leave.

Permanent contracts of employment and payment between assignments – possible exemption from the principle of equal treatment on the basis of Article 5(2)

The proposals as outlined will ensure the exemption is not used within the sector represented by the ALP.

Agreements between workers' and employers' representatives

ALP has no comment to make on this.

Pregnant women and new mothers

The draft Regulations state that where hirers are unable to make adjustments to protect an agency worker who is pregnant or a new mother from identified risks it will fall to the agency to offer alternative work or, if this is not possible, pay the agency worker for any

period of the assignment when she cannot work due to a health and safety risk.

The requirement to pay applies for the duration or likely duration of the original assignment but will not apply if the agency worker unreasonably refuses a suitable assignment. These new rights will only apply where the agency worker is not an employee and has satisfied the qualifying period and is entitled to equal treatment.

ALP comments that:

- This matter is currently abused by a number of hirers who without any or adequate risk assessment state that there are no adjustments that can be made and no alternative work available for pregnant agency workers.

- The draft Regulations have failed to address this and will allow unscrupulous hirers to discriminate against pregnant agency workers without consequence as they will now be secure in the knowledge that the agency worker will be paid and will therefore have no cause for complaint. The burden and cost has been pushed entirely on to the employment business yet the discrimination is by the hirer. This is surely contrary to the intention of the Regulations. It has the potential to lead to increased discrimination against women of child bearing age.

- Provisions should make clear that the hirer must perform a suitable and sufficient risk assessment and where possible remove any risks to the pregnant woman. Failure to complete this should render the hirer liable in any tribunal action brought by the agency worker under these Regulations and other legislation.

- There should be no right to continuing maternity suspension pay where a worker unreasonably refuses suitable alternative work. "Suitable alternative work" should be explained in the guidance.

- The length of suspension on pay should reflect the intended length of the assignment in accord with the current right to payment for SSP. Guidance should clarify what is intended to be meant by "likely duration of the original assignment".

5. Access to employment, collective facilities and vocational training

Access to Employment Vacancies

The draft regulations say that an agency worker has the right to be treated no less favourably than a comparable employee doing the same or similar job in the hirer's establishment in relation to information about vacancies.

ALP has no comment to make on this.

Temporary to Permanent status

Article 6.2 of the Directive requires that, "Member States shall take any action required to ensure that any clauses prohibiting or having the effect of prohibiting the conclusion of a contract of employment or an employment relationship between the user undertaking and the agency workers after his/her assignment are null and void or may be declared null and void."

The Consultation states that it is proposed to amend the Conduct Regulations to introduce an express 'reasonableness' test to limit any "transfer fee" an employment business can

charge to a reasonable one and to require any extended period of hire, as an alternative to paying the transfer fee, to be reasonable.

It is noted that the Consultation also states that "We are nevertheless of course open to further representations from the agency sector regarding the impact this proposal may have, and will maintain dialogue on it with REC and other agency representative bodies."

ALP comments that:

- The government proposal is contrary to the requirement of the second part of Article 6.2 which states that action Member States take shall be "without prejudice to provisions under which temporary agencies receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers". The proposal prejudices temporary agencies ability to receive a reasonable level of recompense. It enables at any stage a hirer to issue a legal letter prior to action stating that it no longer considers the temp to perm charges that it previously agreed to as "reasonable". This will in effect compromise employment businesses to accept lesser terms than those originally agreed to in writing between the parties. As a principle it is not for the Government to legislate on what is a reasonable fee in a commercial negotiation.

- Article 6.2 of the Directive refers to "any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the agency workers". The key words are "prohibiting" and "preventing" which by definition refer to clauses only that exclude or bar the conclusion of an employment relationship. By definition they do not refer to arrangements that delay such a relationship such as an extended hire period. To apply a "reasonableness" term to the extended hire period would be goldplating goes beyond the requirement of the Directive.

- Article 6.2 of the Directive refers to "an employment relationship between the user undertaking and the agency workers". There should therefore be no change to "temp to temp" or "temp to 3rd party arrangements" as these are not covered by the directive. To apply a "reasonableness" term to these situations would be goldplating and goes beyond the requirement of the Directive.

- The Consultation states "that there would be doubt as to our compliance with the Directive were we not to introduce an explicit reasonableness test. It goes on to say that "any fee set at a 'reasonable' level by negotiation will be compliant with the amended Regulations". This is reassuring. However this is not reflected in the draft of the amended Conduct Regulations – Regulation 10. To comply with the policy intention the amended Conduct Regulations should explicitly state that "'Reasonable' in the context of any transfer fee and extended hire period shall be defined as that agreed by negotiation between the employment business and the hirer as reasonable".

- The Consultation states "that there would be doubt as to our compliance with the Directive were we not to introduce an explicit reasonableness test. This is not accepted. As the initial ALP consultation response stated there is existing legislation in place already that establishes compliance with Article 6.2 of the Directive as follows:

    - That temp-to-perm fees must be agreed in writing – thus providing the opportunity for the client to refuse any unreasonable terms – and if they are not they are null and void.

    - That any agreement must include the option of an extended hire period - and if they don't they are null and void. This precludes any transfer fee which has the effect of preventing the conclusion of an employment relationship between the user undertaking and the agency workers.

    - The Unfair Contracts and Terms Act 1977 establishes provisions for the assurance of reasonableness in contractual terms.

- Existing legislative provisions are consistent with the requirements of the Directive. There is no evidence that temp-to-perm fees currently restrict workers ability to obtain permanent work on the basis that they are unreasonable.

- The use of the term 'reasonable' unless defined as above is inadequate. If it is the unsatisfactory intention to remain with this term undefined then to limit litigation the guidance should contain practical advice on:

    - A reasonable process to determine what is "reasonable".

    - What situations may render terms agreed as reasonable between the parties, within the commercial contract, to no longer be reasonable.

    - Mediation and arbitration as alternatives to litigation.

    - The process to replace what are regarded as unreasonable terms with reasonable ones without rendering them null and void.

Access to onsite facilities for agency workers

ALP has no comment to make on this.

Access to training

ALP has no comment to make on this.

6. Thresholds for bodies representing workers

ALP has no comment to make on this.

7. Information to workers' representatives

ALP has no comment to make on this.

8. Establishing "equal treatment"

The "basic working and employment conditions" to which equal treatment will apply will be those that "apply generally" in the workplace in the hirers' contracts of employment, collective agreements, pay scales and company handbooks or similar and other matters of custom and practice in the workplace concerned. In recognition of the fact that deciding equal treatment will in practice often entail comparison with a 'flesh and blood' comparator, the draft regulations also expressly provide that treatment consistent with that given to a true comparable employee will be deemed to mean compliance with the regulations.

ALP has no comment to make on this.

9. Liability

The draft regulations provide that the agency is responsible for any breach of a right in relation to basic working and employment conditions unless it establishes a defence. A reliable defence is if they have taken "reasonable steps" to obtain the necessary information from the hirer and acted "reasonably" in determining the agency worker's basic working and employment conditions. In such case the hirer is to be responsible in full or in part for the breach of the right. There is no a legal requirement for the hirer to provide the agency with the information on equal treatment, this matter will be addressed through guidance. In the event of a claim it is a matter for the agency worker who in the "chain" of relationships they cite in any claim or later join to a claim.

In relation to an equal treatment claim where the hirer is solely responsible (e.g. access to canteens, child-care) the agency will not be held liable because the agency will have no role in delivering these entitlements.

ALP comments that:

- Hirers will, as a standard contractual term, require employment businesses to indemnify them against claims made under the regulations. This will be on a non-negotiable "take it or leave it" basis so that the employment business will be liable financially even if they mount an acceptable defence. This negates the otherwise reasonable provisions on liability. There should be an explicit provision which prevents hirers from avoiding their duties under the equal treatment regime.

- There should be an explicit obligation on the hirer and other intermediaries to respond to equal treatment queries from the temporary work agency.

Information on equal treatment for workers

The draft regulations do not specify the nature of the information about equal treatment on basic working and employment conditions that should pass from hirer to agency nor the timescale in which this should be provided.

The draft regulations state that after the 12 weeks have elapsed, the agency worker can request a written statement from the agency (and subsequently from the hirer, if they do not receive a response from the agency, both of whom will have 28 days in which to respond) about any aspect of equal treatment on basic working and employment conditions which they do not believe they are receiving. If the agency worker goes on to make a claim under the regulations, the Employment Tribunal can draw an adverse inference from the fact that the written statement was not provided.

ALP comments that:

- Templates for the following in the guidance will be of assistance.
    - Information provision from hirer to agencies
    - Information requests from workers to agency and hirer
    - Information provision from agency and hirer to workers

10. Dispute Resolution, Employment Tribunals and Remedies

The regulations will enable an agency worker to bring a claim to an Employment Tribunal - usually within 3 months from the date of the infringement/detriment and the regulations will be added to the list of jurisdictions covered by the Employment Appeal Tribunal.

In the event that the Tribunal upholds the worker's complaint, the Tribunal may compensate the worker for infringement of his or her rights or the detriment suffered. Where a Tribunal orders compensation, the amount of compensation payable to the agency worker by either the agency or hirer will be required to be "just and equitable" having regard to the extent of that party's responsibility for the infringement. The level of award will be based on any financial loss of any benefit that an agency worker should have received and any expenses reasonably incurred as a result of the infringement. Generally, any award will not include injury to feelings, although it will be possible to include injury to feelings in relation to a claim that the worker has been subjected to a detriment for asserting their rights under the Regulations. As in other regulations, there is no statutory cap on the amount of compensation that can be awarded. The principle of contributory conduct applies so that where the tribunal finds the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by the action of the claimant, it shall reduce the amount of compensation by such proportion as it considers just and equitable.

Disputes relating to rights under the regulations will be eligible for Acas pre- and post-claim conciliation.

Agencies will be encouraged to set up or use internal dispute resolution procedures as a way of informally resolving problems related to equal treatment.

ALP comments that:

- The Gangmasters Licensing Authority has already indicated that it will enforce the Agency Workers Regulations 2010.

- This is as allowed under the Gangmasters (Licensing) Act 2004 s8, "The Authority may make such rules as it thinks fit in connection with the licensing of persons acting as gangmasters.

- This will create a differential enforcement regime with regard to the Agency Workers Regulations 2010 within the sector regulated by the GLA in relation to all other sectors.

- It is not covered within the policy intentions nor in the response to issues arising from the previous consultation whether it is the intention of the Government to create such a differential enforcement regime or whether such claims against the rights afforded by agency workers in the Directive should only be enforced through the employment tribunal system. This is an omission that should be dealt with following this second consultation.

11. Review of restrictions and prohibitions on use of temporary agency work

ALP has no comment to make on this.

Reducing administrative burdens/regulatory costs

A Working Group will be formed in early 2010 to examine the practical implications of the proposed Regulations and to look at offsetting measures that could be implemented to reduce any additional administrative costs.

ALP is happy to contribute to this process.

13. Entry into force

The Consultation states that the regulations will come into force on 1 October 2011 thus giving the sectors using agency workers time to prepare for this change.
This date, being the latest common commencement date allowed by the Directive is regarded as the most appropriate to allow the maximum time for effective communication of the requirements; renegotiation of contracts; establishment and implementation of systems and procedures; training within employment businesses and end users.

The change will require re-budgeting and new business plans for employment businesses and end users and will allow organisations to deal with the consequences of this.

This timescale will allow employment businesses and end users time to establish equal treatment and reduce the burden on employment tribunals.

There is a danger that if the entry into force of these regulations is too quick, employers will simply stop using agency workers with the consequential negative effect on the labour market.