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**SUBMISSION BY THE ASSOCIATION OF LABOUR PROVIDERS FOR THE BIS
GUIDANCE ON THE AGENCY WORKERS REGULATIONS 2010**

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Introduction

The Association of Labour Providers (ALP) is the trade association for organisations that supply workers within the food, agricultural and other GLA sectors. The ALP represents over 270 labour provider businesses, all of which will be directly affected by the Regulations.

On 19 October 2010 the Government confirmed that it will not be proceeding with any amendment of the Regulations and will instead now use the time that is still available before the Regulations' entry into force to develop the best possible guidance to help employers comply with their new obligations.

The ALP offers its support to BIS and is willing to contribute fully to the process of developing the Guidance. This document contains the ALP's submission on specific issues that should be covered in the Guidance.

The Guidance cannot be used to goldplate the Regulations but rather should explain the best current understanding of the legal position.

a) Jurisdiction

Guidance should cover whether models of supply currently used will come within the jurisdiction of the Agency Worker Regulations or the Temporary Agency Workers Directive as applied in another EU state or outside of both of these entirely:

- The use of so called "offshore" based e.g. Sark, Isle of Man, Madeira intermediaries where there is or is not a UK based temporary work agency.
- Overseas non EU based e.g. Hong Kong intermediaries where there is or is not a UK based temporary work agency.
- An EU-base e.g. Poland, temporary work agency where there is or is not a UK office.
- An overseas non EU-based temporary work agency where there is or is not a UK office.

It is to be expected that any such overseas / offshore model that avoids being under the Regulations or the Directive will rapidly grow in popularity.

b) The Interpretation of Hirer

Whether separate sites or operations are to be regarded as the same hirer if they are i) under the ownership of the same legal entity and ii) different legal entities but under the same holding company and in both cases whether this is impacted by the contractual supply agreement between the temporary work agency and hirer.

c) The Meaning of Agency Worker

Regulation 3(1)(b)(ii) indicates that a genuine substitution clause would bring an individual out of the definition of “agency worker”. This should be dealt with in guidance.

The exclusion of individuals under Regulation 3(2) will allow a loophole that will be easily exploited by unscrupulous employment businesses. This is less of a concern in the Gangmasters Licensing Authority (GLA) regulated sector where the operation of this model is prevented by the requirement that each limited company needs to hold a GLA licence in its own right.

Guidance should limit the ability to use bogus self employment to defeat the Regulations.

d) The Meaning of Temporary Work Agency

Guidance should expand on the meaning in Regulation 4(1)a of “under the supervision and direction of hirers” and cover the relevant factors to be considered in making such a determination. This should be consistent with relevant employment, health and safety and insurance case law as to the definition of “supervision and direction” to provide legal precedent.

Guidance will also need to explain the distinction between those who are covered in Regulation 4(1)b and those who are excluded in 4(2).

e) Rights to Equal Treatment

Basic Working and Employment Conditions (Regulation 5(2)) – what “ordinarily included in the contracts” of employees/workers of the hirer includes and excludes in practice.

Comparable Employee (Regulation 5(3)) – The guidance should emphasise that there is a distinct order for assessing the comparator:

- i. Firstly that it is someone doing the same role at the same establishment. In the absence of such a person then the comparator is:
- ii. Someone doing the most “broadly similar work” at the same establishment. In the absence of such a person then the comparator is:
- iii. Someone doing the most “broadly similar work” at a different establishment of the hirer.

Guidance should include the factors to be taken into account in determining what is to be considered the “same” work and what is to be considered “broadly similar work” and when it is appropriate to move on to the next category of comparator.

Where different establishments are involved, the Guidance should explain that there may be legitimate differences in basic terms and conditions due to geographical cost of living variations, historical market rate positions of the establishments etc.

It would appear from the drafting that the absence of an actual comparator is not fatal to an agency worker's claim for equal treatment. Regulation 5(1) states that "an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer". The Guidance should provide a purposive interpretation as to whether it was the intention of Regulation 5(1) that a "hypothetical comparator" argument can be made.

If this is the intention of Regulation 5(1), then Guidance should confirm that the existence of an actual comparator as defined in both 5(4)(a) and 5(4)(b) precludes a "hypothetical comparator" argument.

Comparable Employee (Regulation 5(4)) – Guidance is required regarding 5(4)ii that a comparable employee is one "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills". The Guidance should enable a recruitment consultant and hirer manager broadly to examine roles and to be able to make an accurate decision as to whether the roles are comparable.

Guidance should indicate whether all roles which come within the same Agricultural Wages Order grade will be deemed to be comparable roles.

f) Relevant terms and conditions

Pay - Shift payments are paid to permanent workers 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 in the Guidance.

Pay is stated in Regulation 6(2) as meaning sums payable "in connection with the worker's employment" and also as an "other emolument referable to the employment". The distinction between "in connection with" and "referable to" needs to be drawn out in the guidance.

Whilst the right to the same basic working and employment conditions in 5(2) refers to those "ordinarily included in the contracts" of the hirer the meaning of pay in 6(2) is stated as sums "payable under contract or otherwise". The Guidance should explain what the "or otherwise" means in this context and whether this goes beyond 5(2) with examples.

Attendance bonuses to hirer employees are commonly paid. These may be paid weekly for attending for a full week. Guidance should cover whether or not such short term attendance bonuses are "directly attributable to the amount or quality of the work done by a worker" and therefore qualify as "pay" or not.

There is a conflict between the Regulations' requirement for equal treatment with regard to holiday pay and the calculation method required under the Employment Rights Act 1996 (ERA). The ERA makes a distinction between how a "week's pay" should be calculated between those who work normal hours and those who work variable hours. Permanent employees tend to have normal working hours and thus a week's pay is calculated in accordance with s221-223 of the ERA whilst agency workers tend to have no normal working hours and thus a week's pay is calculated in accordance with s224. This may be further complicated when the hirer has a different contractual arrangement for calculating

holiday pay e.g. P60 earnings. The Guidance should cover how a temporary work agency is to calculate the rate at which holiday pay is paid so as to comply with both pieces of legislation without breaching either and also ensure equal treatment.

Regulation 6(3)(k) specifies “any payment to the worker otherwise than in that person’s capacity as a worker” as one of the payment categories to be excluded from the definition of pay.” This needs to be expanded in the guidance to cover what sort of payments are excluded specifically with relation to such payments as:

- Birth / adoption payments
- Payment for bereavement leave / emergency and dependency leave / Parental leave / birthday payments etc.
- Standby pay
- Dog allowance

Working Time - The Regulations are sparse as to what is meant by equal treatment with regard to relevant terms and conditions that relate to:

- the duration of working time;
- night work;
- rest periods;
- rest breaks

The ALP is concerned that without appropriate Guidance there will be significant practical and operational difficulties and a significant influx of litigation.

The Government has stated that it is committed to maintaining the flexibility that temporary agency workers provide for employers. The Guidance should therefore provide purposive, common sense help to ensure that this flexibility is not curtailed.

Specifically the guidance should address:

- What equal treatment in respect of “the duration of working time” actually means in practice. This should expressly state that it does not mean that agency workers are to be guaranteed the same hours of work – either in number of hours or shift patterns - as are contained within permanent workers contracts.
- What equal treatment in respect of rest periods and rest breaks actually means in practice.
- What equal treatment in respect of “night work” actually means in practice.
- How time for training and payment arrangements for training are covered within this.
- How the Regulations will retain the opportunity to engage agency workers on different shift patterns and working hours arrangements from those of permanent staff to meet the needs of employers.
- 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 currently common practice for agency workers to be sent home early during a shift should the availability of work end for any reason is to be dealt with under the Regulations.

Annual Leave - The guidance should provide an explanation of what is meant by “annual leave” and specifically:

- That issues to do with holiday pay are covered within the definition of pay in 6(2) and 6(3) and are separate to 6(1)(f) regarding annual leave. This is of particular relevance in defining what is and is not excluded in Regulation 10.
- Whether equal treatment is to be regarded as extending to the same rules for agency workers to be able to book and take holiday.
- Whether equal treatment is to be regarded as extending 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 as regards to the priority in departmental holiday booking limits.

g) Qualifying period (Regulation (7))

Guidance should explain what “substantively different” means in 7(3)(b) and also whether this has any relationship with 5(4)ii “broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills”.

The Guidance should indicate the factors to be taken into account in determining whether “the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role”.

Guidance should state what “work” and “duties” mean in this context and whether “work” has a wider definition than the mere function or tasks of the role and extends to include:

- A different department or location.
- A different pay rate.
- A period of retraining in the new role.
- Different hours or shift pattern.
- A different job title.
- A different manager.

With regard to regulation 7(3)(c) the guidance should inform whether there is an implied 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.

h) Permanent contracts providing for pay between assignments

Regarding the derogation permitted by Regulation 10, the Guidance should clarify what is meant by “to the extent to which it relates to pay”.

Specifically, Guidance should address whether or not “pay” for the purposes of Regulation 10 includes payments made to the hirer’s employees, who are comparator employees, in respect of annual leave under the terms of their contracts of employment with the hirer.

By way of example, if a qualifying agency worker works at a hirer's establishment where the relevant comparator employee receives 35 paid days' annual leave, then that agency worker would also be entitled to receive payment in respect of 35 days' annual leave on a pro-rata basis. If that agency worker was engaged on a number of assignments with a number of different hirers during the course of any one year, then there is clearly scope for that agency worker to receive a whole host of differing paid annual leave entitlements depending on the entitlements enjoyed by the respective hirers' comparator employees. Guidance should address whether or not the Regulation 10 exemption affects the paid annual leave position as outlined above.

With regard to contract terms Guidance should include:

- Whether 10(1)(a)(iii) refers to start and finish times or some other expression of "hours of work".
- Compliance with 48 hour opt out requirements under the Working Time Regulations with reference to 10(1)(a)(iv).

Guidance should provide for how 10(1)(d) is complied with when a contract is terminated for conduct, capability, redundancy and for other substantial reasons.

Guidance should also specifically address the effect of Regulation 10 on an arrangement whereby an agency which engages workers under a contract of employment and benefits from a dispensation issued by HMRC in respect of the payment of travel and subsistence expenses on a tax and national insurance-free basis.

i) Calculating the minimum amount of pay

Examples should be provided of the correct ways to interpret regulation 11 with regard to workers paid at the national minimum wage.

The Regulations may currently be interpreted in different ways.

j) Collective facilities and amenities

The term "collective facilities and amenities" used in Regulation 12 should be explained. The Guidance should define what should be regarded as a collective facility, what should be regarded as a collective amenity and how these are to be distinguished from a benefit in kind and therefore excluded under Regulation 6(4).

Examples of what are and what are not to be regarded as collective facilities and/or amenities should be provided, such as from this non-exhaustive list:

- Collective training offered
- Provision of personal protective equipment
- Provision of sanitary conveniences, washing facilities, facilities for changing clothes and for rest and consuming food and drink
- Occupational health facilities and services
- Site parking
- Staff sales facilities
- Whether transport services include optional transport to work facilities

- Company events such as Christmas parties
- Company intranet facilities

Regulation 12(2) allows for less favourable treatment to be justified on “objective grounds”. What may be regarded as “objective grounds” should be covered in the Guidance.

k) Access to employment

Regulation 13 states that “An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer”.

Guidance should outline some of the factors to be considered in determining what is to be regarded as a “relevant vacant post”. For instance, is a legitimate consideration that an employer determines that a vacancy is not a “relevant vacant post” as there is an overall external recruitment ban perhaps because there is an ongoing redundancy programme?

Guidance should also explain whether the requirement “to give that agency worker the same opportunity as a comparable worker to find permanent employment” mean that a hirer needs to give equal opportunity to agency workers to be considered to fill a vacancy as to its own employees? If this is to be the interpretation then this Regulation appears erroneous as the comparable worker already has “permanent employment” so it is unclear how the “same opportunity” can be afforded.

l) Pregnant women and new mothers (Schedule 2, Paragraph 11)

The 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 during which she is unable to work due to a health and safety risk.

To mitigate the financial risk that this imposes upon labour providers the lengths of assignments offered are likely to be foreshortened. Guidance should be provided on how the “intended duration, or likely duration” of assignments will be determined.

The ALP is advised by its members that many hirers will state, as now, that there are no adjustments that can be made and no alternative work available for pregnant agency workers without having completed any or adequate risk assessments. The ALP is concerned that the Regulations may even exacerbate this. The Guidance should reiterate the existing health and safety and equality obligations on hirers to perform a suitable and sufficient risk assessment with regard to pregnant workers.