

Why 'it's good to talk' – the Agency Workers Regulations 2010

Prudent agencies and hirers should be discussing now how they will work together to comply with these long anticipated Regulations on which Government guidance is awaited.

When will the Regulations come into force and who will they apply to?

The Regulations will come into force on 1 October 2011.

They will apply to agency workers, i.e. workers supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer (including workers contracted via an 'umbrella company' or other intermediary) and have a contract with the agency.

The Regulations will not apply to casual workers engaged directly by a hirer or to the genuinely self employed (including those working under genuine managed service contracts) or agencies finding permanent work for individuals. However, 'sham' self employed or managed service contracts will be caught by the Regulations.

What rights do the Regulations give agency workers?

'Day one rights'

From the beginning of an assignment agency workers will have the right to:-

- be informed of relevant vacancies in the hirer's organisation;
- be treated no less favourably than comparable workers in relation to 'collective facilities and amenities' (for example, canteens and crèches) unless this can be justified on objective grounds (cost alone is unlikely to be sufficient);
- information to enable them to determine whether they are receiving their rights.

'Twelve week rights'

Once an agency worker has undertaken the same role (whether on one or more assignments) with the same hirer (whether through one or more agencies) for twelve continuous calendar weeks (irrespective of work pattern) they will have further rights.

A break of more than six calendar weeks during or between assignments in the same job, or commencement of a new or substantively different role, will break the qualifying period. However, structuring assignments to prevent the qualifying period being attained will be caught by the anti-avoidance provisions in the Regulations.

The 'qualifying period' will continue to run during pregnancy related sickness and maternity/paternity/adoption leave. Certain types of absence will merely suspend the 'qualifying period', for example, sickness absence of up to 28 calendar weeks (the agency can make reasonable requests for written medical evidence) and temporary cessation in the hirer's requirements for a predetermined period.

Agency workers who have attained the qualifying period will have the right to equal treatment in:-

- pay – includes basic pay, holiday pay and other contractual entitlements directly linked to the work undertaken, for example overtime, shift allowances, commission and personal performance bonuses; excludes company sick pay, financial participation share schemes, long service or loyalty bonuses, notice pay, maternity/paternity/adoption pay, occupational pension contributions and redundancy pay;
- duration of working time;
- length of night work;
- rest periods;
- rest breaks;
- annual leave.

The relevant test is what the agency worker would have received had they been recruited directly by the hirer. However, there will be 'deemed compliance' with the Regulations where a hirer can identify an actual comparator working under the same terms and conditions, where such terms and conditions are ordinarily included in comparator's contracts.

Separate provisions under the Pension Act 2008 will give agency workers pension rights from 2012.

Pregnant women and nursing mothers

Subject to a twelve week qualifying period the Regulations will provide specific protection for agency workers who are pregnant (including reasonable paid time off to attend antenatal appointments), have recently given birth or are breastfeeding.

Who will be liable for breaches of the Regulations and what are the consequences?

Liability for 'day one rights' will lie with the hirer.

Liability for 'twelve week rights' will lie with the agency to the extent that it is responsible for the breach. However, the hirer will only be liable to the extent that it is responsible. For example, if a hirer provides inaccurate information to an agency or fails to update information, then it will be liable.

Breaches of the Regulations will be dealt with by the Employment Tribunal, which will have the power to, amongst other things, award the agency worker uncapped compensation in respect of the breach and any loss. In cases where the hirer and/or agency are found to have breached the anti-avoidance provisions the Tribunal will be able to make an additional award of up to £5,000.

Practical tips

Good communication between hirers and agencies before and during assignments will greatly ease the burden of compliance on both parties. Hirers which use agency workers on a regular basis should discuss with their agency well in advance how they will work together to ensure the timely and accurate exchange of information.

Hirers and agencies alike should review their policies and procedures as well as their contracts with one another to ensure that they will be able to meet their obligations. Consideration should also be given as to whether warranties and indemnities are necessary.

Diligent record keeping and monitoring will be key.

The good news

In most cases it will be relatively straightforward and inexpensive to comply with 'day one rights'.

Subject to the anti-avoidance provisions, the type of short term assignments commonly used to cover, for example, holiday and sick leave, will be unaffected by the 'twelve week rights'.

Even where the 'twelve week rights' do apply, the limited definition of 'pay' will enable many hirers to continue to limit costs by using agency workers rather than employees.

Perhaps most importantly, the Regulations will not change the status of agency workers. Hirers will continue to benefit from the fact that such workers will not be able to bring claims of unfair dismissal or claim a right to what can be very costly benefits such as maternity pay and company sick pay.

If you are an employer we can –

- identify areas where you may be at risk of claims and help you to address them
- support you with advice on day to day and major issues
- defend you against any employment related claims
- revise your employment documentation and procedures
- provide training to your staff to improve your health and safety compliance
- keep you informed on developments in the law and best practice
- draft compromise agreements for you to give employees and negotiate with their representatives.

If you are an employee we can –

- bring any employment related claims for you
- negotiate an exit from employment for you on favourable terms
- help you with any issues arising during your employment
- advise you on contractual documentation
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For further information

Please call us on 020 7148 7850 or email info@levenesemployment.co.uk.

Alternatively please contact Victoria Willson directly on 020 7148 7852 or email vwillson@levenesemployment.co.uk.

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