

# Agency Workers Directive consultation – what do the proposals mean?

**Following the publication on Friday 8 May of BERR's consultation document on its proposals for the implementation of the Agency Workers Directive (AWD) we now have a firmer idea of what form the Government considers the long-awaited Regulations should take.**

The consultation document itself does not contain draft legislative proposals, but does begin to show how BERR will implement the AWD in the UK and how some key interpretation problems may be resolved.

BERR proposes to carry out two distinct consultations. The one commenced on Friday is centred on the policy behind the implementing legislation. The second, to commence some time after the completion of the present consultation period (scheduled to end on 31 July) will focus on the draft legislation itself. The chequered history of UK legislation relating to temporary and contract workers (eg IR35, MSC, the Conduct of Employment Agencies and Employment Businesses Regulations etc) suggests that in fact more than two consultation periods will be necessary if measures are to be fully workable. However, political priorities may mean that the final legislation is adopted more quickly than ideally it should be.

Despite The Right Honourable Pat McFadden's assurances that the Government will do its best to balance the rights of agency workers with the need to ensure that employers can still benefit from a flexible labour market, many users and suppliers will be concerned that the AWD spells the end of temporary contracting in the UK. The situation may be made worse by the inevitable over-reaction of many commentators

to these proposals. We have been advising the recruitment industry, across a huge range of different sectors and markets, for a long time now and are confident that there are ways in which companies will be able to supply and use temps without too much extra administrative burden or cost (especially given the increasing tax advantages that can be enjoyed when agency workers are used).

However, users and suppliers will need to adopt some new procedures and contract models to minimise this burden. In particular, there will be particular challenges for suppliers and users of lower paid agency staff and temps, but the majority of UK spend on temps and agency workers is on skilled, professional and technical workers who already enjoy reasonable pay rates and who will therefore be comparatively unaffected.

Our firm view is that there is nothing completely unexpected in the consultation. Nevertheless, there is a lot of work that will have to be done on the detail of the Regulations if they are to be workable, and staffing companies and end users will have to adjust some of their current arrangements to minimise extra cost and administrative burden.

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## Key consultation points

The key points to take from the policy consultation include:

**Implementation date:** As previously reported by us, it is expected that the legislation implementing the Directive will not be in force until Spring 2010 at the earliest. It may be delayed until late 2011.

**Employment businesses only:** The proposed legislation will only apply to people who find work through an 'employment business' and not to those placed by employment agencies. As such, only staffing businesses which engage temporary workers under a contract for services or a contract of employment and supply their services to end user clients will be affected. Businesses which purely make introductions will be outside the scope of the proposed legislation (albeit they are affected by the separate current consultation by BERR about changes to the Conduct Regulations).

**Which workers will be protected?:** Importantly, BERR proposes that the draft legislation should include agency workers contracted to an umbrella company, but the genuinely self-employed, personal service company and managed service company workers are stated to be outside the scope of the proposals.

**Qualifying period:** Equal treatment shall apply only after 12 calendar weeks on any assignment. BERR is seeking views on the minimum duration of any break between assignments.

**Basic pay:** The definition of pay for the purposes of equal treatment will include basic pay plus other contractual entitlements directly linked to the work undertaken by the temporary worker whilst on assignment. The consultation document suggests that this should include overtime, shift allowances, unsocial hours premiums/bonuses and bonuses linked to personal and individual performance, but exclude remuneration provided in recognition of the long-term relationship between permanent employee and employer.

**Comparator:** Agency workers will be entitled to some basic pay etc as a 'comparable' permanent employee. The mechanism whereby a comparable worker is identified remains vague. Factors which may be taken into account when identifying a comparator seem

likely to be set out in guidance to the legislation rather than in the legislation itself. This seems likely to cause huge problems. Staffing companies and end users will want clear and simple comparator mechanisms rather than pages of vague guidance.

**Liability for compliance:** BERR proposes that liability for compliance with AWD obligations will rest with the employment business. The employment business will have a defence based on the fact that information supplied by the hirer, and which has been reasonably relied upon, has proven to be inaccurate or incomplete. No proposals are made as to the nature of the enquiries an employment business must make of the hirer to be able to avail itself of this defence. The proposals also include granting the agency worker a right, against the employment business, to have access to information on their equal treatment rights.

## Looking beyond the headlines

The consultation document's headline proposals may prompt over-reaction in the absence of in-depth review. So, what do the proposals really mean for users and suppliers of agency workers?

### Which workers will be within scope?

**Definition of 'worker':** BERR says that it wishes to base its definition of agency worker on the definition of 'worker' in the Working Time Regulations. Workers who undertake to perform personally their services for an end user (ie those who cannot send a substitute) via an employment business are intended to fall within scope. If this approach is adopted, we envisage problems and uncertainty surrounding the meaning of 'personal' service and substitution rights. There have been numerous employment and tax cases on this very question, particularly in relation to IR35 tax issues and the entitlement to paid annual leave. In some recent holiday pay cases, the courts concluded that a 'self-employed' contractor can also have 'worker' status notwithstanding the fact that they are 'self-employed' for tax purposes. BERR's proposed approach will accordingly create lack of certainty as to who is

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and who is not within the scope of the new legislation. Will a contractor who works through a personal service company be outside scope if he is, in fact, personally obliged to undertake the work? BERR has not thought this through yet.

**Umbrella workers:** BERR considers that the primary reason for engagement via an umbrella company is tax management and therefore such an engagement is not a sufficiently different type of employment relationship from a typical agency worker arrangement to warrant its exclusion from the scope of the AWD obligations.

As a policy statement this is not entirely unexpected but the key will be in the legislative drafting. The consultation refers to 'the accepted definition of an umbrella company' as being "where the worker has an overarching employment contract with the company and all the worker's income is treated as employment income, workers are not a director and nor do they own any shares in the company. The worker works for end clients but rather than working directly for them, he or she provides their services through the umbrella company". It appears to us that all consultants who are not directors of their consultancy company, and all employees of organisations (such as IT and accountancy companies) which frequently second employees to clients, would be caught by this. We would therefore expect the definition of agency worker to prove extremely difficult to draft if umbrella workers are to be included. Uncertainty as to the scope of the AWD will remain until this key piece of drafting is finalised, as well as related issues setting out how the Swedish Derogation should apply (see below). We have already raised this point with BERR.

BERR's March consultation on the Conduct Regulations, and in particular the right for limited company contractors and umbrella workers to opt out of the Conduct Regulations,

places further pressure on umbrella companies to find ways to continue to operate in a way which complies with legislation and continues to assist the supply of flexible labour in the UK. We will be issuing a separate briefing on this consultation, but it seems likely, looking at the range of proposals being considered by BERR, that the Government will amend the Conduct Regulations to withdraw the right for all company contractors to opt out.

Even if the opt out is not removed for personal service companies, we think that, given BERR's perception that umbrella companies are being used to exploit vulnerable workers, it is likely that the opt out will be removed for umbrella workers. This would certainly be consistent with the approach that BERR has adopted in its consultation on implementation of the AWD. However, to do this the Government would have to come up with a workable definition of 'umbrella company' for the purposes of restricting the removal of the opt out to umbrella workers and, for the same reasons we have outlined above, this will be difficult to achieve.

#### Which workers will be outside the scope?

**Self-employed:** BERR proposes that those workers who are genuinely self-employed will fall outside the scope of the AWD Regulations. As with the definition of 'worker' this exclusion will create uncertainty in a market where many temporary workers and contractors claim to be self-employed but whose status is, in practice, uncertain. Anyone who has used or supplied the services of a 'self-employed' worker will know that assessment of self-employment status is rarely straightforward: indeed there is currently no single legal definition of self-employment.

**Personal service companies:** BERR proposes that those working through their own limited company will be outside scope. BERR suggests that the reason for this is that the individual workers do not have a direct contract

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for personal services with the employment business. Interestingly, the same could be said for umbrella company workers. We would also question what happens if a personal service company operates within IR35: do workers supplied via such a personal service company fall within scope or will suppliers and users be entitled to rely on the fact that they operate through a personal service company and are therefore outside the scope of the new legislation?

**Swedish Derogation:** To add to the confusion, BERR also proposes to implement the option provided in the AWD (the so-called 'Swedish Derogation') that allows it to exempt agency workers who are engaged under an employment contract which provides for payment between assignments. To limit avoidance via this exemption, BERR proposes that the payment between assignments should be "a reasonably high proportion of the rate of pay enjoyed by the agency worker on his or her previous assignment arranged by their employment business" and has expressed a view that the appropriate level will be at least half the pay rate paid in the previous assignment. The proposed 'half pay' threshold is high. Many commentators had hoped for a figure limited to the national minimum wage or a low multiple thereof.

It seems clear that the Government is intending to leave some scope for agency workers to remain outside the equal treatment regime provided a minimum level of financial security is provided. Employment businesses looking to make use of the Swedish Derogation will need to look carefully at ways of structuring arrangements to ensure that they can fund between assignment wage payments. This will be a far cry from the zero-hours contract arrangements some employment businesses have relied on in the past.

Umbrella companies may also look into ways of modifying their current offerings to fit within the

Swedish Derogation model, perhaps by offering their expertise and systems as a service to employment businesses which decide to go ahead and 'properly' employ their temps. As always, the key will be whether that minimum level is cost-effective in comparison to implementing the AWD obligations.

Another issue raised in the consultation, but not answered, is how long the agency worker needs to be engaged by the employment business after the end of the assignment (ie 'between assignments') to ensure this exemption is not abused. Concerns about operation of the Swedish Derogation will only be resolved when the draft Regulations are published.

#### What is equal treatment?

The AWD establishes that equal treatment for the agency worker will include the hirer providing the same basic working and employment conditions relating to working time and pay as would be applied to a permanent employee fulfilling the same role.

**Working time:** The consultation document proposes that agency workers should, after 12 weeks on an assignment, be entitled to the same rest periods and holiday entitlement as a comparable permanent employee even if such entitlements exceed the statutory minimum periods. PAYE temps and other 'workers' already have rights and entitlements, such as paid annual leave and minimum rest periods, but BERR is proposing that these rights and entitlements will be extended for agency workers if a permanent employee fulfilling the same role has enhanced paid holiday and rest period entitlements. This is likely to be an issue, for example, where the end user allows its employees to take bank holidays as paid annual leave in addition to the statutory minimum 28 days.

BERR recognises that this will potentially cause

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difficulties and proposes that an agency worker could be paid in lieu of any additional paid leave entitlement (over and above the statutory minimum) either by a supplement to the agency worker's rate or as a lump sum at the end of an assignment.

**Pay:** Pay, for the purposes of comparison, is to be (broadly) defined as basic pay plus other contractual entitlements that are linked to the work undertaken by the agency worker while on assignment. It is proposed that this will include holiday pay, overtime, shift allowances, unsocial hours premiums and bonuses and bonuses relating to personal performance, eg based on piece-work. It will, however, exclude benefits such as share participation, profit sharing schemes and car allowances. We anticipate that there will be strong resistance to these proposals from organisations which routinely engage agency workers to perform shift work and work during unsociable hours. The key question in these cases will be whether there is a comparable permanent employee with whom to equate 'pay'.

It is difficult to see how the distinction between performance bonuses and 'employment status' related bonuses will be drawn. The classification of how a discretionary bonus has been 'earned' will always be open to manipulation as employers seek a way to ensure such sums are excluded from any AWD comparison. The point of principle appears to be clear in the Government's statement, but again, assuming the proposal to make this distinction is carried into the implementing Regulations, the key will be in the drafting. We will have to wait and see.

**Pension rights:** It would also appear that participation in company pension schemes will be excluded although BERR also makes the point that existing pension legislation means that from 2012 'personal accounts' will give agency workers the benefit of workplace pension saving with an employer contribution

anyway.

**Self-employed:** BERR proposes that those workers who are genuinely self-employed will fall outside the scope of the AWD Regulations. As with the definition of 'worker' this exclusion will create uncertainty in a market where many temporary workers and contractors claim to be self-employed but whose status is, in practice, uncertain. Anyone who has used or supplied the services of a 'self-employed' worker will know that assessment of self-employment status is rarely straightforward: indeed there is currently no single legal definition of self-employment.

#### How will the 12 week qualifying period work?

BERR's view is that the 12 week period should be 12 calendar weeks and that any break between assignments will need to be of a minimum length before breaking the qualification period. The consultation asks for views on how long the minimum break period should be. BERR thinks that a break of one week could be open to abuse and so is looking for a slightly longer period. We have suggested a four to six week break period as reasonable.

A further proposal which merits mention is that, to prevent circumvention of the Regulations by changing the role that the agency worker is performing before the end of the 12 week qualifying period (and subsequently claiming that the change represents a new engagement), BERR suggests that a broad provision will be included in the legislation stating that a new qualifying period will only begin if the new assignment with the same end user is substantially different. Guidance would be provided to help with the interpretation of this Regulation.

Here again we see the preference of the legislators when dealing with the recruitment sector toward providing broad statutory powers limited in their application by non-binding

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guidance. This will lead to uncertainty.

On the face of it, and assuming the legislation is implemented as described in the consultation document, the scope provided by the 'new engagement, same employer' argument to step outside the AWD will be unclear until it is tested in court.

### Temp to perm fees

The AWD provides that any clause in a contract which has the effect of preventing an agency worker from terminating his contract with the staffing company is null and void. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the 'Conduct Regulations') permit a 'transfer fee' to be charged to the hirer in circumstances where an agency worker terminates his engagement with the employment business and is engaged directly by the hirer. Where this fee is provided for in an end user contract there are no limits on its quantum (except that it must comply with the general law on unlawful restraint of trade) provided that the employment business offers an extended period of hire as an alternative to paying the transfer fee.

BERR considers that to comply with the AWD the Conduct Regulations will need to be amended to limit the level of temp to perm fees to a 'reasonable level of recompense'. The consultation document seeks views on what a 'reasonable level of recompense' would be. We recommend that the representative bodies within the sector make sure BERR is made aware of industry convention and best practice with respect to such fees.

### Representative Bodies

It is the Government's view that agency workers should be treated as counting toward the 'employee' thresholds of the employment business when assessing whether certain representative bodies can or should be

established. This means that agency workers engaged by an employment business would be counted for the purposes of determining whether certain information and consultation requirements should be followed. Most of these thresholds currently exclude smaller employment businesses from the legal requirement to set up the representative body in question but the inclusion of agency workers will change this. However, BERR does acknowledge that because agency workers are not employees, they cannot be made redundant. BERR therefore proposes that agency workers will not count as employees for the purposes of collective redundancy consultation.

If this proposal is included in the final Regulations, it has the potential to result in the effective unionisation of the employment business despite the fact that the workers are each engaged at different locations under different hirers. It is not entirely clear how this would work in practice.

### Clarity in the absence of a comparable worker

After 12 weeks in a particular role an agency worker will be entitled to equal treatment to a person who would have been recruited directly by the hirer to fill the role. As has been widely assumed, the consultation document expects that in practice the concept of equal treatment will be tested by comparing the position of the agency worker with a comparable permanent employee doing broadly similar work. However, how should equal treatment be established if there is no comparable employee?

The Government proposals suggest that non-statutory guidance will set out 'other factors' that will be relevant when no comparison is possible. BERR suggests that pay scales and relevant collective agreements would be relevant other factors, but that comparisons with workers in other organisations or other

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locations are unlikely to be appropriate. We expect that any suggestion of a 'hypothetical' comparator will be strongly resisted by users and suppliers.

### 'Reasonable steps' defence

The consultation document includes a proposal that the employment business will be liable for any breach of AWD obligations. However, a defence would exist if the employment business can show it has taken 'reasonable steps' or used 'best endeavours' to obtain accurate and relevant information from the hirer regarding the equal treatment package. The Government does not currently intend to describe what enquiries would satisfy this defence, but insists that the information must have been given by the hirer to the employment business before the end of the 12 week period.

If this provision is implemented as described, employment businesses will need to ensure they have a system in place under which they routinely obtain this sort of equal treatment information and have policies in place describing their approach if the information is not provided. Many end users may be reluctant to provide pay data to staffing companies.

### Our view

As stated in our initial reaction on Friday, our view is that there is nothing completely unexpected in the consultation. However, there is clearly a lot of work to be done on the detail of the Regulations if they are to be workable, and staffing companies and end users will have to adjust some of their current arrangements to minimise extra cost and administrative burden.

It is also clear that in some key areas Government policy is not fully formed and with the opportunity to inform and shape these decisions still available we recommend that staffing companies act cohesively and decisively in responding to the consultation.

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