

The Agency Workers Regulations 2010: are you ready?

The Regulations, which came into force on 1 October 2011, impact not only on the treatment of agency workers, but also on what information must be disclosed by an employer to employee representatives in collective redundancy, collective bargaining and TUPE transfer situations.

Recent research carried out by a recruitment consultancy has shown that less than 30% of businesses that use agency workers have prepared sufficiently for the Agency Workers Regulations 2010 (AWR) which come into force on 1 October this year. Although to a large extent the burden of the AWR will be borne by temporary work agencies, employers who use agency workers must be aware of their new obligations and have appropriate procedures in place to avoid potential claims. What are the main rights and what do employers - in this context, "hirers" - need to do?

Back to basics – what rights do the AWR provide?

From day one of their assignment with you, temporary agency workers must:

- have access to the same facilities and amenities (for example, your canteen, childcare facilities and transport services) as your directly engaged staff, unless withholding access can be objectively justified
- be informed of relevant job vacancies so they can apply for permanent employment with you - a general announcement in the workplace (for example, on a notice board or intranet) would fulfil this obligation.

After they have been on an assignment in the same role with you for 12 calendar weeks, (weeks worked before 1 October 2011 will not count), temporary agency workers must be given equal treatment in respect of certain basic working and employment conditions. Equal treatment will be established by considering what working and employment conditions the agency worker would have been provided with had he or she been recruited by you directly. This is best achieved by looking at the terms and conditions ordinarily contained in contracts of your directly engaged staff. Terms and conditions that must be matched are those relating to:

- 'pay', which includes basic pay, payment for annual leave (above the Working Time Regulations entitlement if that is what a comparable direct hire is contractually entitled to), overtime payments, shift/unsocial hours allowances, bonuses directly attributable to the amount or quality of the work done by the agency worker, and vouchers with monetary value and capable of being exchanged (for example, luncheon vouchers) that are not part of a salary sacrifice scheme
- the duration of working time, night work, rest periods, rest breaks and annual leave.

Equal treatment does not extend to matching occupational sick pay, occupational pensions, redundancy pay and the majority of benefits in kind, to name but a few.

The AWR set out who is an agency worker (and who therefore benefits from the protection of the AWR), what counts towards the 12-week qualifying period (including breaks between assignments that only pause and do not restart the qualifying period clock and other circumstances where the clock may continue to run), what constitutes 'pay' and how a 'pay between assignments' contract can avoid the operation of the requirement to provide equal treatment in relation to 'pay'. Guidance issued by the Department for Business Innovation and Skills (BIS) provides useful clarification on these and other aspects of the AWR.

On completion of the 12-week qualifying period, pregnant agency workers will have the right to paid time off for antenatal care under the AWR. They will also have the right to be offered suitable alternative work if their assignment cannot be completed on health and safety grounds related to their pregnancy or payment in lieu if alternative work cannot be found. Liability to locate alternative work or pay the agency worker in the event that none can be found rests with the temporary work agency under the AWR, although the temporary work agency may seek to impose a contractual obligation on you to make any such payment.

An agency worker who believes his or her rights under the AWR have been infringed can request a written statement about the basic working and employment conditions from the agency and, in some circumstances, the hirer (in relation to 'day one' rights and if the agency does not respond to a request for information on basic working and employment conditions). Such requests must be responded to within 28 days of receipt. An agency worker can also bring a tribunal claim against the temporary work agency and/or the hirer for a breach of any rights under the AWR. Although the primary liability for providing equal treatment in relation to basic working and employment conditions lies with the temporary work agency, you, as the hirer, could also be liable if you have not properly shared with the temporary work agency information about your working and employment conditions. Only you, the hirer, will be liable for any failure to provide the 'day one rights'. In addition, a structure found to have been deliberately set up to prevent the agency worker from qualifying for equal treatment could result in an additional award of up to £5,000 to the agency worker in the event of a successful employment tribunal claim.

What additional information must now be supplied to workplace representatives?

The AWR impose new obligations on employers when disclosing information in collective redundancy, collective bargaining and TUPE transfer situations to employee representatives. In these situations, from 1 October 2011, employers must also include the following in the information supplied:

- the number of agency workers working temporarily for and under the supervision and direction of the employer
- the parts of the employer's undertaking in which those agency workers are working
- the type of work those agency workers are carrying out.

Failure to comply is likely to result in a financial penalty and employers must ensure their processes and pro-forma documentation for collective redundancy consultation, collective bargaining and TUPE transfer situations include this information going forward.

What should hirers do?

To comply with your AWR obligations as a hirer and protect your business, you should:

- ensure you know what your obligations are
- conduct a thorough AWR impact assessment
- ensure that you know who in your business will be within scope of the AWR and who will be outside scope
- compile relevant information about pay scales and other working conditions outlined above
- assess the potential cost impact of the AWR on your business and consider alternative models of supply if the cost impact is prohibitive
- discuss relevant issues, including cost, with the temporary work agencies you use (staffing companies and umbrella companies)
- take care when sharing information about pay with agencies – consider obtaining properly worded confidentiality and non-poach undertakings from the agency in advance
- consider other changes to existing or new contracts with temporary work agencies such as provisions making clear who will do what, if possible an appropriate indemnity against liability under the AWR from the agency and other provisions to apportion and minimise risk

- ensure that 'day one rights' are provided at the outset of an assignment from 1 October 2011 and that these rights are properly communicated to agency workers – consider introducing a special agency worker induction pack (taking care to differentiate from employee induction processes)
- review how you award bonuses and consider whether to integrate agency workers into your performance appraisal systems
- set up a system for responding to information requests from agency workers
- ensure any pro forma documentation you use for collective redundancies, TUPE transfer and collective bargaining situations are amended to include the required information concerning agency workers.

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