



- THE AGENCY WORKERS REGULATIONS -

Briefing for REC members
February 2010

Background

The purpose of the Agency Workers Regulations is to give temporary agency workers the same basic pay and employment conditions as they would have been entitled to had they been recruited by the hirer directly to do the same job. This right will commence after the agency worker has had 12 weeks' of service with the same hirer.

What does this mean for the recruitment industry?

The Department for Business Innovation and Skills (BIS) published the Regulations in January 2010 following consultation with interest groups. To view the Regulations please [click here](#). Below is an overview of what the Regulations will mean for recruiters:

Timescales

The Regulations have now been laid before Parliament and should be passed into UK law before the general election this year. Despite considerable pressure from trade unions, REC strongly argued the case that recruitment agencies and hirers need time to prepare for the change and that the availability of a temporary workforce will be crucial for businesses emerging from the recession. Taking these arguments on board, the Government has decided to delay the implementation of these Regulations to 1st October 2011.

Scope of who equal treatment applies to

The Regulations apply to all temporary agency workers regardless of whether they are on a contract of employment or contract for services. However, workers who are genuinely in business on their own account (e.g. self-employed or working through a corporate vehicle) will not be within scope, but those employed via umbrella companies or other intermediaries will be. Managed service contracts (i.e. those where the supplier rather than the hirer, manages or directs staff) are not expressly excluded, but they will be outside scope unless, in reality, the user, rather than the manager service, supervises and directs the staff.

Definition of equal pay

Pay will include basic pay and additional entitlements that are linked to the work done by the agency worker during an assignment. Pay will include the basic hourly rate, overtime and shift allowances, unsocial hours premiums, payments for difficult or dangerous duties and lunch vouchers. However, the definition of pay will exclude benefits such as occupational sick pay, occupational pension schemes, occupational maternity pay and redundancy pay which are seen to be provided in recognition of the long-term relationship between an employer and a permanent employee. Profit sharing schemes will be excluded, however bonuses which are directly attributable to the quality and quantity of work done by an agency worker will be included. The REC remains concerned around this wider inclusion of bonuses and the possible effects this may have on employment status where the hirer may have to appraise the worker to determine whether they are entitled to a bonus. This is of great concern and we are following this matter up in tandem with the CBI.

Holiday entitlement

Agency workers who qualify for equal treatment will be entitled to the same holiday entitlement, including any amount over and above statutory entitlement, which workers in the hirer's organisation receive. REC had argued for holidays to be limited to the statutory entitlement (currently 28 days). Unfortunately, the Government has decided that they are legally bound to include holiday entitlements within the Regulations. To help reduce the administrative burden on agencies, the Government has suggested that payment can be made in lieu of extra holiday over and above the statutory entitlement. Essentially, this means the current statutory 28 days holiday will continue to be accrued but additional holiday pay could be rolled up.

Establishing equal treatment

The Regulations will require an agency worker to be treated as if he or she had been recruited directly to do the same job, whether the direct recruitment would have been as an employee or as a worker. On a practical level, this means that equal treatment will need to be established in respect of the terms and conditions that are ordinarily incorporated into contracts. Therefore pay scales, benefits outlined in company handbooks and collective agreements must be taken into account when establishing equal treatment. However it will not include things that do not fall within these limits, such as individually negotiated contract terms or one-off discretionary payments. This issue will need to be further addressed in the Government's guidance. If there are no pay scales or other common terms at the hirer then equal treatment may entail a comparison with a 'flesh and blood' comparator. Reflecting this, the Regulations allow for treatment which is consistent to that given to a comparable employee to be deemed compliant with the Regulations. Where the agency worker is performing a unique role there is no 'equal treatment' on pay. However other common benefits in the workplace, such as holidays and bonuses, could apply.

The 12 week qualifying period

Equal treatment provisions will apply after the worker has been engaged for 12 calendar weeks regardless of the working pattern (e.g. full time or part time). A new qualifying period will begin only if a new assignment with the same hirer is substantively different, or if there is a break of more than six weeks between assignments in the same role. The 12 weeks qualifying period can be paused if the worker takes annual leave, takes certified sick leave or takes time off for public duties. Concerns remain around how agencies will cope with workers who have a series of ad hoc assignments with the same hirer and the REC will continue to engage with Government on how to find practical solutions to this problem.

Liability

The agency will be liable for any breach of a right in relation to equal treatment for which they are responsible. However they will have a defence 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 cases the hirer will be liable. The hirer is also liable to the extent that they are responsible for any breach of a right in relation to equal treatment. Any party in the "chain" of relationships can be named at the outset or joined to a claim and is liable to the extent that they are to blame for the infringement.

Provision of information

After the 12 weeks have elapsed, an agency worker will be able to request written information from the agency (and subsequently the hirer) about any aspect of equal treatment which they do not believe they are receiving. The agency and, if necessary, the hirer will each have 28 days to respond, to run from the date of receipt of the request.

Dispute resolution and anti-avoidance measures

Agency workers will be able to bring a claim to an Employment Tribunal to enforce their rights under the Agency Workers Regulations. Internal grievance procedures and Acas preclaim conciliation will be used to help avoid cases going to Tribunal. The regulations also introduce penalties in certain circumstances. REC is also concerned about increased pressures on an already stretched ET system.

Pregnant women and new mothers

Pregnant women will be allowed paid time off to attend medical appointments and antenatal classes. They will also need to be found alternative sources of work on a pay rate that is no less favourable than the last assignment if they can no longer complete the duties of the original assignment for medical reasons. If alternative work cannot be found, then the pregnant woman will have the right to be paid by the agency for the remaining expected duration of the assignment.

Temp to perm fees

A serious area of concern was the proposal to amend the Conduct Regulations and insert a test of 'reasonability' on the current temp-to-perm fees. The REC protested that there was no evidence to suggest that temp-to-perm fees act as a barrier to hirers for taking temps on permanently and sees that this would be difficult to enforce. The Government have taken this into account and decided **not** to introduce a test of 'reasonability' - current temp to perm fee structures will remain as they are.

Access to vacancies and collective facilities

From day one of an assignment, hirers will need to ensure agency workers are made aware of vacancies that arise in their organisation. Agency workers will also be entitled to access a number of collective facilities including crèche and childcare facilities, canteen facilities and the provision of transport services, but access to these can be refused if there are 'objective grounds' for doing so. 'Amenities' e.g subsidised gym membership, season ticket loans and childcare vouchers are out of scope as they are considered a reflection of the long term relationship between and employee and a hirer which would not be appropriate for agency workers.

Legitimate ways to derogate from the principle of equal treatment

Agencies that have a contract of employment with their workers and pay them in between assignments do not need to establish equal treatment for those workers when they are placed with hirers. However the workers must be paid at least 50% of what they were being paid in their previous assignment when out of work and no less than National Minimum Wage. They must be paid for an accrued four weeks whilst between assignments before the contract can be terminated.

Where does the REC stand on this issue?

Whilst right in principle, the REC has had serious concerns as to how equal treatment can work on a practical level. Equal treatment after 12 months rather than 12 weeks would have been a more agreeable option – allowing protection for temporary agency workers whilst at the same maintaining flexibility for hirers.

However, the REC has had a sustained lobbying campaign, at a national and a European level, to shape the Regulations so that they can be workable in the UK. It is for this reason that the REC established an Agency Work Commission, made up of recruiters and hirers who use agency workers as well as the CIPD and legal experts, which made practical recommendations to the Government on how equal treatment could best be implemented. Many of these recommendations have been incorporated into the final Regulations.

Next steps

REC is in regular dialogue with the Department for Business, Innovation and Skills (BIS) and will continue to engage with them in producing guidance for clients and recruitment agencies. Meanwhile, the REC external relations team will continue to build links with the Conservative business team in the event that they win the general election and the Regulations are reviewed.

The REC is in regular dialogue with its members at sector groups, regional meetings, several agency summits and members of the Employment Policy Committee to assess the potential impact on the industry and how we can make the Regulations workable. We will continue to listen and engage with our membership.

An AWD tool-kit will be produced for REC members before the end of the year. We will be delivering sector specific advice via our sector groups as well as providing support and assistance via our legal helpline and the Academy for Business. How the Regulations will impact upon the use of agency workers will be incorporated into our training and qualifications with a series of workshops with legal experts. There will be an early



opportunity to hear about the Regulations at the REC's [On The Road](#) events which will be happening in early 2010.