

# **NEW AGENCY WORKERS DIRECTIVE**

## **Briefing for Employers**

This briefing document explains what the new regulations on agency workers will mean for hirers who engage workers via a temporary staffing supplier. With the legislation coming into force in **October 2011**.

## **What are the Agency Worker Regulations?**

The new regulations derive from European legislation designed to give temporary agency workers parity in pay and employment conditions as they would have been entitled to had they been recruited by the hirer directly to do the same job. Whilst in other parts of the EU, this entitlement comes into effect from day one of an assignment, the UK has a derogation period of 12 weeks. **This means the agency worker needs be engaged for 12 weeks' of service with the same hirer, in the same role, in order to qualify.**

## **Definition of Agency Worker:**

An individual who:

- a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
- b) has a contract with the temporary work agency which is;
  - i. a contract of employment with the agency or;
  - ii. any other contract to perform work and services personally for the agency

## **Definition of a Hirer**

A person engaged in economic activity public or private, whether or not operating for profit, to whom individuals are supplied to work temporarily for and under the supervision and direction of that person

## **Will agency workers be entitled to the same rights and benefits of employees?**

The new regulations will not change the employment status of agency workers who will still **NOT** have the rights to claim **unfair dismissal, redundancy pay or maternity leave**. Nor will agency workers be entitled to the same benefits such as **occupational sick pay, company pension schemes, financial participation schemes and bonus payments** based upon organisational or company performance. These are considered a reflection of the long term relationship between an employee and an employer. Agency workers will therefore remain a flexible labour resource for hirers.

## **What will the agency worker be entitled to from day one?**

Whilst other benefits are only given after 12 weeks, there are some benefits which agency workers will be **entitled to from day one of an assignment**. Firstly, you will need to ensure that agency workers are **made aware of vacancies** that arise in your organisation. Secondly, 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.

## **What will the agency worker be entitled to after 12 weeks?**

**Agency workers will be entitled to the same basic pay and working conditions.** This includes the **basic hourly rate** and any additional entitlements that are linked to the work done by the agency worker during an assignment. It will include the same **overtime and shift allowances, unsocial hours premiums,**

**payments for difficult or dangerous duties and lunch vouchers. Bonuses which are directly attributable to the quality and quantity of work done by an agency worker will also be included. Agency workers will also be entitled to the same rest breaks and annual leave allowance.**

### **What is the Regulations definition of pay?**

*"Any sums payable to a worker of the hirer in connection with the workers' employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise but excluding any payments or rewards these to be listed within Regulation 6.3".*

Pay therefore includes basic pay together with those contractual entitlements linked to work undertaken by the agency worker on assignment, namely:-

- **holiday pay** (including public and bank holidays);
- **overtime pay;**
- **shift allowances;**
- **unsocial hours premiums or bonus;**
- additional payments for permanent staff are entitled to for particularly difficult and dangerous duties;
- **bonuses linked to individual performance** (for example, piece work) but excluding other forms of bonus (for example, profit share or shared participation which reflect long-term performance or reward loyalty); and
- **vouchers** or stamped with a monetary value, such and lunch and transport vouchers.

However, the Regulations specifically **exclude financial participation** schemes, occupational pension and occupational sick pay. However, under the Pensions Act 2008 agency workers will have the benefit of workplace pension saving with an employer contribution from 2012.

### **Who will be protected?**

The Regulations apply to **all temporary agency workers** regardless of whether they are on a contract of employment or contract for services. PAYE workers who are employed via an umbrella company will also be within scope. 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. 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 of scope unless in reality, the user, rather than the manager service, supervises and directs the staff.

### **How will I establish equal treatment?**

In some workplaces, for example a factory production line, the agency worker may be working next to a worker recruited directly who could serve as a 'flesh and blood' comparator to establish parity in pay and working conditions. In these circumstances the hirer and the agency will be deemed compliant with the regulations. If a 'flesh and blood' comparator cannot be found, then there may be an identifiable pay scale or a starting rate which could be used as a reference point. In other workplaces, the agency worker may be a unique hire and there may be no easily identifiable comparator, pay scales or starting rates. In these circumstances, parity does not need to be established. However, in all scenarios agency workers will be entitled to benefits which 'apply generally' in the workplace. Benefits outlined in company handbooks, employment contracts and collective agreements will be taken into account by the courts in determining parity in pay and working conditions.

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

**The provisions will apply after the worker has been engaged for 12 weeks** regardless of their working pattern (e.g. full time or part time). **A new qualifying period will only begin 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.** The regulations include a complex set of anti-avoidance provisions designed to make it difficult for hirers to circumvent the qualifying period.

### **Who is liable for establishing equal treatment?**

It is envisaged that most cases will be effectively dealt with via a recruitment agency's grievance procedure. Where this fails, a pre-conciliation service will be available via Acas to minimise the number of claims that end up in an employment tribunal. **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. This will mean the hirer and the agency will need to work together closely to share appropriate information to ensure the agency worker is receiving equal treatment.

### **Some of the agency workers I engage get paid more than my own employees. Will I have to lower their rate of pay to match the rate paid to permanent workers?**

No. If the agency worker you are supplied with are on a higher rate of pay than your own employees then their pay does not need to be lowered. However you may need to show the steps you put in place to decide on the temp's rate of pay.

### **Can I circumvent the Directive by employing temporary workers directly?**

Unlike workers employed directly, agency workers do not have rights to claim unfair dismissal, request maternity or paternity leave or claim redundancy pay. This makes them a flexible resource for employers to meet unexpected peaks in demand and cover for absences. Employing workers directly, even on zero hour contracts, means workers may qualify for those additional rights. The regulations will not change the employment status of agency workers who will continue to be a more flexible resource than permanent workers employed directly.

### **Are there legitimate ways to derogate from the regulations?**

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.

### **Timescales**

The regulations have now been laid before Parliament and should be passed into UK law before the general election in 2010. 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.**