



Q&A on the latest Agency Worker Regulations

Q: Will the new Agency Worker Regulations apply to individuals who provide their services through a limited company or umbrella company?

A: The Regulations apply to individuals supplied by a temporary work agency (TWA) to work temporarily for and under the supervision of a hirer. The definition of a TWA covers not just standard recruitment agencies, but also intermediaries including umbrella companies or a master or neutral vendor. Individuals will not be prevented from coming within the scope of the Regulations simply because they work through their own service companies, unless they are genuinely self employed.

Q: What rights will an agency worker acquire on the first day of an assignment?

A: From day one, an agency worker will have the right access collective facilities and amenities available to the hirer's directly recruited workers. This can include facilities such as car parking, staff canteen or a crèche. They also have the right to be given information about any suitable vacancies within the hirer, so they can apply for the role just as a directly recruited worker could. These are known as 'Day One' rights.

Q: What rights will an agency worker acquire after 12 weeks service?

A: Once an agency worker has completed 12 weeks' with a hirer, they will be entitled to the same "basic working and employment conditions" they would receive had they been directly recruited by the hirer. This relates to:

- Pay
- Duration of working time
- Night work
- Rest breaks/periods
- Annual leave

Q: What is included within 'pay'?

A: "Pay" covers basic pay, overtime payments, shift or unsocial hours allowances, payment for annual leave and vouchers

with a monetary value. It also includes bonuses or commission payments that are directly attributable to the amount or quality of the work done by the individual. We anticipate there will be developments over time in identifying when bonuses should be paid and how a worker's performance is evaluated for that purpose.

Each element of pay will be considered separately. Therefore, if an agency worker receives more basic pay than a directly recruited worker this does not mean they do not need to receive a shift allowance that the directly recruited worker is paid. Equally, being paid more does not mean an agency worker will not be entitled to the other areas of equal treatment.

Where providing agency workers with the same 'basic working and employment conditions' is likely to be an issue, or if a hirer does not want to disclose details of their pay scales, bonus arrangements etc, then the Swedish Derogation model may provide a solution to this.

Q: What is the Swedish Derogation model?

A: This is an exemption within the regulations from the right to equal treatment in relation to pay, which was negotiated by the Swedish government in order to reflect its labour market. In order for the Swedish Derogation to apply certain minimum criteria must be met, including:

- The TWA must engage the agency worker on a permanent contract of employment which sets out: how pay is to be calculated; the locations where the agency worker will be expected to work; expected hours of work for any day assignment; maximum and minimum hours of work; and the nature of any work which may be offered and any qualifications required.
- The contract must also specify that the agency worker has no right to equal treatment in relation to pay under the Regulations.

• The agency worker must have an entitlement to be paid a minimum amount between assignments by the TWA.

- The TWA must take reasonable steps to seek alternative work for the agency worker.
- That the contract cannot be terminated until the TWA has paid the agency worker an aggregate of not less than four calendar weeks pay whilst they have not been working.

However, it is important to recognise that this only means that agency workers will not be entitled to equality of pay (including bonuses, shift allowances, overtime payments etc). They will remain entitled to Day One rights and the other elements of the right to equal treatment, once they have completed 12 weeks service.

Q: Who will be liable if an agency worker brings a claim?

A: For claims relating to Day One rights, the hirer will be solely liable for any breach. For claims relating to breaching the right to equal treatment, liability can rest with either the TWA and/or the hirer. This will depend on the extent to which an employment tribunal determines either is responsible for the breach.

In either instance, if there is found to be a breach, an employment tribunal can award compensation that it considers “just and equitable” in the circumstances, which is likely to relate to any financial loss suffered by the agency worker.

Q: Does the agency worker require a comparator in order to bring a claim?

A: This depends on what type of claim is being pursued. For a claim relating to breaches of Day One rights, the agency worker must be able to point to an actual comparator. The appropriate comparator will be someone working for the

hirer and engaged in broadly similar work as the agency worker.

For a claim of breaches of the right to equal treatment, no actual comparator is required. The agency worker must establish the terms and conditions he/she would have received had he/she been recruited directly. The fact that an actual comparator is not required makes it difficult for hirers to know what the correct terms for the agency worker should be. In these circumstances, hirers are best advised to identify what terms they would offer someone they engaged direct and apply these to the agency worker.

Q: How is the 12 week period calculated?

A: An agency worker needs to complete 12 weeks continuous service in the same role for a hirer, in order to acquire the right equal treatment. However, in some circumstances where there is a break in the assignment continuity will be suspended, rather than come to an end. This includes breaks of less than six weeks, breaks due to annual leave, and also breaks due to ill health of less than 26 weeks.

Neither the TWA or hirer has responsibility for monitoring when the 12 weeks has been accrued, however, it is in the interest of both to keep this under review.

Q: Can I avoid Regulations?

A: Be warned that the Regulations contain anti-avoidance provisions if assignments are being structured in order to prevent the agency worker from accruing 12 weeks service in the same assignment. These allow any court or tribunal to infer that the agency worker has the right to equal treatment and also to fine the hirer and/or the TWA up to £5,000.



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