VODG Briefing Note
Agency Workers Regulations 2010

The Agency Workers Regulations 2010 come into force on 1 October 2011. The regulations will have a dramatic effect on the conduct of temporary staffing agencies and their role, but for the many members of VODG who use temporary staff the consequences of not being aware of the regulations could also be serious.

The Regulations will give rights to agency workers against hirers which will be enforceable through the Employment Tribunal and, if successful, an agency worker might be entitled to:

- compensation;
- a declaration of employment rights; and
- an order to rectify any discrepancy in treatment between the worker and the hirer's own staff.

Who do the regulations apply to?

- Individuals who work as temporary **agency workers.**
- Individuals or companies involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer (**temporary work agencies**).
- **Hirers** (such as VODG members).

The regulations will apply to intermediary bodies and, in certain circumstances, internal staffing banks.

What rights are agency workers afforded under the Regulations?

Equal Treatment:

With limited exceptions, after 12 weeks of being in a given job (which will generally be 12 continuous weeks), agency workers will have the right to the same basic working and employment conditions as staff employed directly by the hirer. Service before 1 October will not count towards the 12 week period.

Basic working and employment conditions will include:

- the duration of working time;
- the length of night work;
- rest periods;
- rest breaks;
- annual leave; and
- pay (but note that there are detailed provisions regarding what constitutes pay set out below).

Maternity Rights:

The following rights apply to pregnant workers, subject to the 12 week qualifying period:

- reasonable time off for ante-natal appointments;
- suitable alternative work (at the same rate or higher) if the agency worker can no longer complete their original duties for health and safety reasons; and
- if there is no suitable alternative work available, payment for the remainder of the expected duration of the original assignment.

Hirers will also be required to make reasonable adjustments to protect an agency worker who is pregnant, has recently given birth, or is breastfeeding, from identified risks.

Access to employment and facilities ("day 1 entitlements"):

From the beginning of the assignment (or for assignments which began prior to 1 October, from 1 October 2011), unless different treatment can be objectively justified, an agency worker has the right of access to:

- permanent employment with the hirer (by being informed of relevant vacancies);
- facilities already available to comparable employees, such as canteens, child-care, prayer rooms, common rooms, shower facilities, car parking and transport.

According to the BIS Guidance, to justify less favourable access rights, the hirer should ask themselves "is there a good reason for treating the agency worker less favourably?" Cost may be a factor, but is it is unlikely to be sufficient alone to justify different treatment.

Liability and remedies:

The liability for not providing day 1 entitlements will rest with the hirer, as the temporary work agency has no role in providing access to these.

In relation to basic working and employment conditions after the 12 week qualifying period, the liability usually rests with the temporary work agency. However, if the hirer does not provide the temporary work agency (or the worker on request) with sufficient information as to what constitutes equal treatment, they may also find themselves liable.

In the event of a successful claim by an agency worker, a Tribunal may:

- award compensation;
- make a declaration setting out the agency worker's rights in relation to the matters to which the complaint relates; and/or
- recommend that the hirer/agency takes certain action to remove the adverse affect on the agency worker within a specified period.

The Regulations contain strict anti-avoidance provisions, and where such avoidance is established, guilty parties may be liable for a fine of up to £5,000.

What should a hirer do to comply with the Regulations:

- Ensure the day 1 entitlements are afforded to agency workers, (unless it can be justified not to);

- Provide the following information to the temporary work agency (on request) once an agency worker completes 12 weeks in a given job:
  - the level of basic pay (based on the annual salary an agency worker would have received if recruited directly);
  - details of overtime payments, shift/unsocial hours allowances or risk payments for hazardous duties;
  - details of bonus schemes operated;
  - details of any vouchers offered which have a monetary value; and
  - annual leave entitlement.

- Respond, within 28 days, to a formal written request from the agency worker to provide all relevant information relating to:
  - in respect of an agency worker's day 1 entitlements, the rights of a comparable worker or employee and the reasons for different treatment of agency workers; or
  - in respect of an agency workers' entitlements after the 12 week qualifying period, their basic working and employment conditions, any relevant factors considered in determining those conditions and any differences in treatment of comparable employees.

FREQUENTLY ASKED QUESTIONS

How do I calculate the 12 week period?

The right to equal treatment does not apply until an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous calendar weeks. A calendar week is any period of 7 days starting on the first day of the assignment. Any week during the whole or part of which an agency worker is engaged on an assignment is counted as a calendar week.

The qualifying period is not retrospective – the earliest the 12 week period can begin will be the 1 October 2011.

Does the 12 week qualifying period mean 12 continuous weeks?

Yes, although continuity can be retained for breaks in service of up to 6 weeks. For any break shorter than 6 weeks, the 12 week period will merely be suspended. Breaks of 6 weeks or more will result in continuity of service being lost unless the absence is due to:

- sickness;
- annual leave;
- jury service;
- certain temporary cessations of the hirer's work, for a pre-determined time, due to custom and practice (for example a teacher's summer break);
- a strike or industrial action at the hirer's place of work; or
- statutory maternity, paternity or adoption leave.

What if an agency worker moves roles before 12 weeks service are achieved?

Where an agency worker moves roles, continuity will be broken for the purposes of calculating the 12 week qualifying period.

For the purposes of counting the 12 qualifying weeks, an agency worker will only be considered to be working in a new role if:

- the agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency;
- the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role; and
- the temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role.

In such circumstances, hirers should seek an undertaking from the agency that this information has been or will be provided within an appropriate timescale.

In addition, the Regulations contain anti-avoidance provisions which prohibit the structuring of assignments in a way which the most likely explanation for the structure of the assignment is for the purposes of avoiding the regulations.

What if an assignment is terminated after 11 weeks? Will that be avoidance?

No. However, if the same agency worker starts a new assignment in the future, you will need to consider whether continuity of service has been retained and the anti-avoidance provisions.

What if agency workers are treated "more favourably" than permanent staff?

Although the Regulations require "equal treatment", this right is only conferred upon agency workers (the Regulations give no rights to permanent staff). Therefore the Regulations will have no effect.

What would constitute a 'staffing bank' for these purposes?

The BIS Guidance states that individuals working for in-house temporary staffing banks where a company employs its temporary workers directly (and they only work for that same business or service) will not be covered by the Regulations.

However the Regulations do protect individuals who have a contract with one legal entity, but are placed into another to provide work. This will therefore cover temporary placements between group companies or by staffing banks which are separate legal entities themselves.

Who are the comparators for the purpose of equal treatment and providing information about comparable employees?

The guidance to the Regulations states that it is not necessary to look for a comparator: *"In most cases equal treatment can be simply established by giving the same relevant entitlements* ***"as if"*** *he/she had been recruited as an employee or worker to the same job".*

However, if the hirer treats the agency worker in the same manner as an appropriate comparator (who must be an employee), the hirer will be deemed to have complied with the Regulations.

How can we protect the confidentiality of the information we provide? Are there data protection issues?

In order to ensure information given to the temporary work agency is kept confidential (except between the temporary work agency and the agency worker), you should ensure that this is addressed in your agreement with the temporary work agency.

The Regulations do not require hirers to provide information about named individuals. Instead, the information that the hirer is required to provide is related to the basic terms and conditions that the agency worker themselves would have received had they been recruited directly. Provided any information being disclosed is limited to that required by the Regulations, and does not identify any individuals, then it will not constitute "personal data" within the meaning of the Data Protection Act 1998.

What constitutes pay?

The Regulations define pay as "any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment".

The following are expressly excluded from the definition of pay:

- any payment by way of occupational sick pay;
- any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;
- any payment in respect of maternity, paternity or adoption leave;
- any payment referable to the worker's redundancy;
- any payment or reward made pursuant to a financial participation scheme;
- any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service;
- any payment for time off for carrying out trade union duties, etc;
- guarantee payments;
- any payment by way of an advance under an agreement for a loan or by way of an advance of pay;
- any payment in respect of expenses incurred by the worker in carrying out the employment; and
- any payment to the worker otherwise than in that person's capacity as a worker.

Is "pay" based on combining basic pay and unsocial hours enhancements together or does each element of pay need to be equal?

Provided pay is genuinely equivalent to the pay the agency worker would have received had they been recruited directly, there is no need to calculate each element separately. However, it may be easier to ensure (and, if required, prove) equal treatment where each element is addressed separately.

The Regulations do not entitle agency workers to any pay that they would not be entitled to if they were recruited directly by the hirer. Therefore, they do not need to be given any pay enhancements that the hirer's employees are not entitled to.

Will we be prevented from rewarding loyalty and long service, for example by offering more holiday to longer serving employers?

No, providing that agency workers are entitled to the same rewards. For example, if permanent employees are entitled to an additional annual leave day for each year of service, agency workers must be entitled to the same.

If you would like to discuss the Regulations further, please contact Matthew Wort at matthew.wort@anthonycollins.com or any member of the Employment team on 0121 212 7494

All efforts have been made to ensure the accuracy of this information. Please note that this advice is intended to be general advice only and was correct at the time of publication. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of this briefing. Remember, each case is different, and accurate advice must be tailored to the individual case.

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