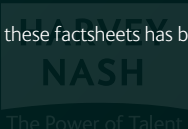




The Power of Talent

How does an agency worker qualify for equal treatment?



The information in these factsheets has been kindly supplied by the Recruitment and Employment Confederation (REC)

Factsheet 3 - How does an agency worker qualify for equal treatment?

The Agency Workers Regulations 2010

The Agency Workers Regulations will come into force in England, Scotland and Wales on 1 October 2011. In Northern Ireland the Agency Workers (Northern Ireland) Regulations 2011 will come into effect on 1 December 2011.

The Regulations will give agency workers the right to the same basic working and employment conditions they would receive if they were engaged directly by an end user client to do the same job; this is limited to conditions that relate to pay and working time. Agency workers will also be entitled to access on-site facilities that an end user client provides to its own workers and to be advised by a client of vacancies which arise in the client's business.

This Factsheet is the third in a series of 7 which will look at the Regulations in detail. They have been written for REC Members that operate as employment businesses.

For the purpose of this Factsheet "agency" means an employment business (which engages workers and supplies them to a client to work under the client's control and supervision). Employment agencies in the strict legal sense, which introduce candidates to a client to be engaged directly by that client, are not affected by these Regulations.

A reference to an "agency worker" means the individual engaged by the agency and supplied to work for the client under the client's supervision and control (for further details on who is an agency worker see Factsheet 1).

Factsheet summary

The Regulations will give agency workers new rights to receive treatment equal to that of a client's own directly engaged workers in respect of pay, conditions relating to working hours, access to the client's on-site facilities and the right to be informed of job vacancies that the client has.

Agency workers will have a right to access client on-site facilities and to be informed of job vacancies applying from day one of an assignment. However the additional rights to equal pay and working conditions will only apply to agency workers who "qualify" by working for a "qualifying period." In this Factsheet we look at how an agency worker will establish the right to equal treatment and how the qualifying period is measured.

1. How does an agency worker qualify for equal treatment?

The Regulations state that an agency worker is not entitled to equal treatment until the agency worker has completed the qualifying period. Under Regulation 7 an agency worker will complete the qualifying period by working *“in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.”* On the face of it, counting 12 weeks may seem fairly straight forward but there are a number of factors that will in practice make the 12 week period difficult to measure.

12 weeks with the same client

The agency worker must complete the 12 week period by working in the same role with the same client. However, the agency worker does not have to work for those 12 weeks through the same agency. This means that an agency worker can complete the qualifying period even if supplied by more than one agency to the same client. Agencies will therefore need to have mechanisms in place to identify those agency workers who may have already been supplied to a client. Ultimately the agency worker will be best placed to provide this information. We would suggest that this is addressed at the registration stage. However the client should also be asked to provide this information as the liability under the Regulations rests with the agency and or the client (see Factsheet 5).

What is the same role?

Regulation 7(3) states that the agency worker will be working in the same role unless the agency worker starts a new role in which the work or duties are “substantively different.”

In some cases it will be relatively straightforward to identify when the work that the agency worker is doing in a new assignment is “substantively different” but there will be situations when this is not easy to identify. However, the Regulations place the focus on the work and duties performed during the assignment, so if the only difference in a new assignment is that the agency worker moves to a different department or a job title has changed, this will not be a new role. For example, if an agency worker is supplied to provide admin support (typing, filing, etc) within a client’s sales team and moves to do the same work for the marketing department for the same client, the work and duties here are clearly the same and there is no new role.

Even if the work and duties are “substantively different,” the agency worker will only be deemed to be in a new role if the agency notifies the agency worker in writing about the type of work which she/he will be doing in the new role. Presumably, the purpose of this is to ensure that the worker is aware that the duties will be different and to flag up that this may delay or prevent the agency worker from reaching the 12 week qualifying period. If the agency worker starts a new assignment, albeit carrying out the same work and duties as in a previous assignment, but with a different client, this will not be the “same role” for the purposes of the Regulations. In this case the agency worker will start a new qualifying clock for this new assignment. Agency workers can have a number of qualifying clocks running at the same time. More clarification is needed to identify a “substantively different” role and this is one of the areas that the REC is pressing the Government to address in its guidance to the Regulations.

2. Breaks in assignments

Working for 12 continuous weeks

Any week in which the agency worker works for the hirer will count towards the 12 week qualifying period, even if it is for just one day in a week. However, the agency worker does not have to work for 12 continuous weeks in order to reach the qualifying period. The Regulations allow the agency worker to have certain breaks in an assignment without having to start counting towards the 12 weeks from scratch. This means that an agency worker's qualifying period can be accrued over a period of time which exceeds 12 weeks.

The six week break

Regulation 7 provides that if the agency worker takes a break from an assignment for any reason and the break is for six weeks or less, on returning to the same role, the weeks that the agency worker previously worked will be carried forward. So for example, if an agency worker works for eight weeks in a role with a client and takes a two week break from the assignment for whatever reason, on returning to the same role with the same client, the agency worker will enter into the ninth week of the count towards 12 weeks. The agency worker will not have to start counting again from zero but will only need a further four weeks to reach the 12 week qualifying period.

Other breaks permitted in the Regulations

An agency worker will also be able to carry forward weeks previously worked towards the qualifying period if they have a break in continuity which is caused by:

- sickness or injury (up to a maximum of 28 weeks and provided evidence is given to the agency where requested);
- pregnancy, childbirth or maternity and the agency worker is within a "protected period" (i.e. from the beginning of pregnancy to 26 weeks from childbirth);
- statutory/contractual maternity, adoption or paternity leave;
- jury service;
- periods when the client does not require the agency worker because of various types of industrial action at the client's establishment; or
- periods when the client does not require the agency worker because the business has temporarily closed down (e.g. Christmas shut down).

This means that even if the break is for six weeks or more but is for one of the reasons listed above, any weeks worked prior to the break will be carried forward and added to any weeks worked subsequently.

Weeks where the agency worker will be deemed to be working even when unable to continue working in a role

As stated above, there are permitted breaks under the Regulations where an agency worker is absent from a role but returns to the same role with the same client and the qualifying clock continues to run. The Regulations will also allow an agency worker to count weeks toward the qualifying period when the agency worker starts a role but then is unable to complete it. These circumstances are fairly limited and will only apply if the reason that the agency worker has not returned to the assignment is related to pregnancy, childbirth or maternity and/or due to statutory or contractual maternity, paternity or adoption leave. The agency worker will be deemed to have worked in any week which is covered by the above reasons for either the actual duration of the assignment or the likely duration of the assignment. (See Factsheet 6 for more information on new rights for pregnant agency workers).

3. Achieving the qualifying weeks while working for different agencies and the issues this will raise for recruiters

As can be seen, the 12 week qualifying period can actually be achieved over a longer period of time if the agency worker's assignment or assignments is or are broken by certain circumstances. When registering and supplying a new agency worker, it will be crucial for the agency to have procedures in place to identify whether the agency worker has already worked for the same client in the same role even if this is through a different agency. The agency worker may have already worked some weeks towards the qualifying period or may even have completed the full 12 weeks and be immediately entitled to equal pay and working conditions. Where this is the case, it is important that the agency takes steps to ensure that the working and employment conditions applied are compliant with the Regulations.

Is the client or agency worker best placed to provide information?

Agencies can request this information from the agency workers at the registration stage as they will ultimately be best placed to confirm whether or not they have previously worked for the same client. Agencies should also at the same time as proposing a worker to the client, request information from the client as to whether the worker has previously undertaken any role with them via another agency, and if so what the role was and what the earliest date is that the worker worked for the client. However, clients may not always keep a record of who has already worked for them and may rely on agencies to identify those workers who will be entitled to equal treatment. (See Factsheet 5).

Tracking entitlement

There may be significant problems in tracking and monitoring agency workers to identify at what stage the qualifying period is reached, particularly in those sectors where agency workers are engaged by

multiple agencies. However, clients who presently are keen to avoid paying temp-to-temp transfer fees may already have mechanisms in place to identify workers who have previously worked for them through another agency. In this case it may not be too difficult for them to provide agencies with information which will assist in ensuring that the Regulations are complied with. Agencies must ensure that they have sought relevant information from the client in order to avoid liability under the Regulations. (see Factsheet 5).

4. Can the agency worker count time worked in an assignment before the Regulations come into effect to qualify for equal treatment?

No. The Regulations will not be retrospective. This means that any time spent on an assignment up to and including 30 September 2011 will not count towards the qualifying period.

5. Are agencies or clients allowed to structure assignments in a way to prevent agency workers from reaching the 12 week qualifying period or stop giving them equal treatment?

No. Prior to the drafting of the Regulations, concerns were raised about the possibility that agency workers could be prevented from receiving equal treatment if they were unable to reach the 12 week qualifying period as a result of the way that their assignments were structured by either agencies, or clients.

In order to combat this possibility, the Regulations include specific provisions which entitle the agency worker to be treated as if the equal treatment provisions apply even if she/he has not reached the 12 week qualifying period. The provisions also protect agency workers who having reached the 12 week qualifying period then have their assignment arranged in such a way which results in their entitlement to equal treatment coming to an end.

There are three circumstances in which this provision applies:

- if an agency worker has completed two or more assignments with the same client;
- if the agency worker has completed one assignment with a client and at least one other assignment with another person that is connected with the client (e.g. another company in the same group of companies);
- if the agency worker has worked for the same client but in different roles.



Example

Client A Ltd and Client B Ltd are both owned by the same parent company. Client A instructs an agency to supply an agency worker to work in its distribution centre and the agency worker carries out the assignment for 10 weeks. The assignment then ends. Client B then instructs the agency to supply the same agency worker to work in its warehouse in an assignment which lasts for 10 weeks. After this time Client B terminates the assignment, and the agency worker is again supplied to Client A for a further 10 weeks before returning to a further assignment with Client B. The agency worker is prevented from reaching 12 weeks in either the distribution centre role or the warehouse role because more than six weeks is spent away from each of the roles at a time.

The anti-avoidance provisions mean that the agency worker may be treated as if the 12 week qualifying period has been reached once the agency worker has completed the second week of the assignment with Client B (10 weeks worked with Client A and two weeks worked with Client B equals 12 weeks in total i.e. the qualifying period). This is because both companies are connected and the agency worker has been supplied into roles which individually are not long enough to allow the 12 week qualifying period to be reached.

The Regulations essentially provide that if, in any of the above circumstances, the most likely reason for the structure and the arrangement of the assignments is that either the agency or the clients have tried to prevent the agency worker from reaching the 12 week qualifying period or to prevent an agency worker who has reached the 12 week period from continuing to receive equal treatment, the agency worker will continue to have the benefit of the equal treatment provisions in any case.

The issue to be determined here is whether the most likely reason for the arrangement of these assignments is to prevent the agency worker from having the benefit of equal treatment. In the event of a dispute, the factors that an Employment Tribunal will take into account are as follows:

- the length of the assignments;
- the number of assignments carried out with the client and any connected clients;
- the number of times the agency worker has worked in a new role with the client and, where applicable, a client connected to the client, where the new role is not the same role;
- the number of times the agency worker has returned to the same role with the client or a connected client;
- the period of any break between assignments with the client and any client connected with the client.



The clients in the example above may well have other reasons, operational reasons for example, which explain the pattern of these assignments, but in the absence of an explanation the agency worker will be treated as if equal treatment applies.

6. Are there any restrictions on clients requesting temporary workers for less than 12 weeks?

No. The anti-avoidance provisions will not mean that clients will be prevented from taking on an agency worker for 12 weeks only or for less than 12 weeks. A client will still retain the flexibility to take on an agency worker to meet its requirements and to terminate an assignment at or before 12 weeks if required.

The anti-avoidance provisions apply to scenarios where the same agency worker (or group of workers) have undertaken more than one assignment or more than one role with the same client or connected clients. This provision would not prevent a client from being supplied with a series of different agency workers for periods of less than 12 weeks.

Examples of how to calculate the 12 week qualifying period:



Example 1

A starts a new assignment on 1 October 2011. From that date A is entitled to use any staff canteen, childcare or transport facilities. A works continuously for 12 weeks in that assignment. From week 13, A is also entitled to receive equal treatment in terms of pay and working conditions in comparison to the client’s own directly engaged staff.



Example 2

B starts a new assignment on 1 October 2011. From day one B is entitled to access client on-site facilities such as the staff canteen, childcare or transport facilities. B works continuously for four weeks, then takes a one week holiday before returning to the same role. This one week break does not stop the qualifying clock and the four weeks previously worked are carried forward. B works for another six weeks before the assignment is terminated by the client making a total of 10 weeks accrued qualifying time. After five weeks B is supplied to the same client to do the same role but this time through a new agency. The five week break does not stop the qualifying clock and the 10 weeks previously worked will be carried forward. B now only has to work for another two weeks in the same role with the client to reach the qualifying period at which point she/he has qualified for the right to equal pay and working conditions and provided she/he does not take any breaks longer than six weeks.



Example 3

C starts a new assignment on 2 January 2012. From day one C is entitled to access client on-site facilities such as the staff canteen, childcare or transport facilities. C works continuously for five weeks, and then takes a four week holiday. This does not stop the qualifying clock and the five weeks worked to date are carried forward. C returns to the same assignment, and works for another five weeks before the assignment is terminated by the client. C now has 10 weeks on the qualifying clock. After seven weeks the client requests that C returns to do the same job. This seven week break exceeds the six week break permitted by the Regulations and stops the qualifying clock. Therefore, in the new assignment C will start from zero in working towards the 12 week qualifying period.



Example 4

D starts work for the client on 1 August 2011. From day one D is entitled to access client on-site facilities such as staff canteen, childcare or transport facilities. D works continuously for 12 weeks. However the period up to and including 30 September 2011 does not count towards the qualifying period as this date falls before the Regulations come into force (1 October 2011). Only those weeks worked from 1 October 2011 will count towards the qualifying period.



Example 5

E is a pregnant agency worker. She starts a new assignment on 2 January 2012, working three days a week. From 2 January 2012 E is entitled to access the client's on-site facilities such as staff canteen, childcare or transport facilities. She works for eight weeks before taking one week off with pregnancy related sickness before returning to the same role. In terms of the qualifying clock, because her absence was pregnancy related, she will be treated as if she worked in the week that she was absent, meaning that she returns to the assignment with nine weeks worked towards the qualifying period.



Other Factsheets

Factsheet 1: An introduction to the Agency Worker Regulations

Factsheet 2: The application of the Regulations to limited company contractors

Factsheet 3: How does an agency worker qualify for equal treatment?

Factsheet 4: What is equal treatment?

Factsheet 5: Liability for breach of the Regulations

Factsheet 6: Maternity rights under the Regulations

Factsheet 7: Employed agency workers – when does equal treatment not apply?

REC Legal February 2011

The Department of Business, Innovation and Skills (BIS) is currently working on guidance to assist clients and agencies to implement the Regulations correctly. The REC is working closely with BIS on this guidance which should be released in April 2011. The Department of Employment and Learning (DELNI) are currently consulting on the NI Regulations (these are almost identical to the UK Regulations) and will produce separate guidance later this year.

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