



Liability for breach of the Regulations



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Factsheet 5 – Liability for breach of the Regulations

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 fifth 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 clients 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

There will be no independent body tasked with policing and enforcing the Regulations. Instead agency workers will be able to enforce their rights under the Regulations by pursuing a claim in an Employment Tribunal. Such claims can either be brought against the client or agency or both, depending on the particular breach in question. Generally the liability will lie with the party that is responsible for the breach.

In this Factsheet we look at the different issue relating to liability. Additionally we also look at the steps that agencies should take to minimise their liability, in particular in terms of the information that should be sought from clients to ensure that agency workers receive equal treatment. This Factsheet provides a sample of those questions. It also looks at the remedies available to agency workers in the event of breaches of the Regulations.

Enforcing the Regulations

1. Failure to provide equal treatment (basic working and employment conditions)

The Regulations state that if a qualifying agency worker does not receive equal treatment (basic working and employment conditions), then the agency worker can pursue a claim in an Employment Tribunal against either the agency or the client (or both). An Employment Tribunal will analyse the facts to determine to what extent each party is responsible for the breach of the Regulations.

This means that when determining what compensation will be awarded to an agency worker who is successful in bringing a claim, the Employment Tribunal can apportion the award against the party or parties which it concludes is responsible for the failure to provide equal treatment.

In practice this is likely to result in the agency that has the direct contractual relationship with the agency worker bearing primary liability for the breach since it will be responsible for paying the agency worker and agreeing the terms and conditions that apply to the agency worker.

However, in practice, the only way that the agency will be able to ensure that the agency worker works under the same terms and conditions (pay and working conditions) as would have applied if the agency worker had been engaged directly by the client, is to rely on information that it receives from the client as to what those terms would be.

Agency defence

To this end, the Regulations provide a specific defence for agencies if:

- The agency either obtains information from the end user client about the basic working terms and employment conditions in the client's business or takes reasonable steps to obtain this information; and
- acts reasonably in determining what working terms and employment conditions the agency worker should be engaged under once the 12 week qualifying period has been reached; and
- ensures that it provides the agency worker with those working and employment conditions.

If the agency complies with the above it will not be liable if the agency worker does not receive equal treatment. If the client is at fault because, for example, it has provided incorrect information to the agency, then the client rather will be liable.



Example

The agency is instructed to supply an agency worker to client X for a maternity cover assignment. The client advises the agency that the role will last for at least six months. The agency asks the client for details as to what terms and conditions it would include in the agency workers contract in terms of basic working and employment conditions (including pay) if the client was to engage the agency worker directly after the 12 week qualifying period to do the same role.

The client provides the agency details of the annual salary and the agency uses this to calculate what hourly rate it should pay the agency worker once the 12 week qualifying period has been reached in the assignment.

If it subsequently transpires that the salary details that the client has provided are in fact not consistent with what the client would have paid a directly recruited worker to do the same job, the liability will rest with the client.

Information that agencies should seek to obtain from client

We have set out a non-exhaustive list of the information that an agency should request when taking instructions from a client:

- Is there a comparable employee in the client's business? If yes, what terms is that comparable worker or employee engaged under?
- If there is no comparable employee, then what terms would the client have engaged the agency worker on if they were to engage them directly?

In particular agencies need to know about the following:

Pay (see Factsheet 4)

- What are the hourly rates payable to a comparable employee? Alternatively, if a salary is paid, what hourly rate does that equate to?
- Is commission paid? If yes, how is this calculated?
- What bonuses are payable, on what basis and when?

What rates are paid for overtime and/or unsociable hours?

Working time

- What are the anticipated hours of work?
- What rest breaks does the client give to other workers?
- Annual leave - what contractual holiday is the comparable employee or worker entitled to – is it equal to or greater than the statutory minimum?

Previous time working for the client

- Has the worker worked in the same role at that client previously, even through another agency? This is important because the agency worker may have already accrued some time towards the qualifying period (see Factsheet 3).

The agency should obtain the necessary information in sufficient time to allow it to comply with its obligations under the Regulations. We would recommend therefore obtaining the information from the client either prior to the commencement of the assignment, or as soon as the agency knows the assignment will last more than 12 weeks.

Liability of other intermediaries in the supply chain

It is increasingly common for recruitment businesses to supply agency workers to clients via intermediaries, including master or neutral vendors or umbrella companies, which, for the purpose of the Regulations are also “temporary work agencies.” Where more than one “temporary work agency” is involved in the supply of the agency worker who alleges that there has been a failure to provide equal treatment, an employment tribunal shall consider the extent to which each is responsible for the alleged breaches. The various intermediaries which may share the obligation to provide equal treatment include:

- Second tier suppliers - in order to rely on the agency defence an agency needs to take reasonable steps to obtain information about equal treatment from the client. Agencies will need to put mechanisms in place to manage ensure this information is received if they do not ordinarily have a direct relationship with the end user client;
- Master or neutral vendor - they will also need to take reasonable steps to obtain information from clients about equal treatment in order to rely on the defence. Additionally master and neutral vendors will need to consider whether their terms may need to be revised, particularly whether they currently obstruct second tier suppliers from having any contact or obtaining any information from end user clients;
- Umbrella companies - they usually have the direct contract with the agency worker and will also be responsible for ensuring that the agency worker receives equal treatment. An umbrella company wishing to limit its liability may also seek to obtain information regarding equal treatment from the client or via the agency.

2. Failure to provide access to collective facilities and information about vacancies

Under the Regulations the client will be liable for any failure to provide the agency worker with access to its collective facilities and amenities or to information about job vacancies that the client has. An agency worker is entitled to these rights from day one of their assignment (see Factsheet 3).

Helping clients meet their obligations under the Regulations

Whilst the agency has no liability for ensuring that the agency worker has access to collective facilities and information about vacancies, they will be able to help their clients to meet their obligations by asking the following questions on receipt of instructions to supply an agency worker:

- What collective facilities are available to the client's own workers? These include, for example canteens, child care facilities and transport services;
- Can the client justify on objective grounds withholding access to these collective facilities from agency workers?
- How does the client advertise any vacancies which arise?

3. What steps can an agency work take before issuing a claim in the Employment Tribunal?

Requests for information to the agency/client

If an agency worker believes that the right to equal treatment may have been breached, the Regulations allow the agency worker to request a written statement from an agency that provides information about the treatment that the agency worker has received.

To trigger this formal procedure, the agency worker must make the request in writing. Once the agency receives this request it will have 28 days to respond and in order to comply with the Regulations the written response must include the following information:

- relevant information relating to the basic working and employment conditions of the workers of the hirer;
- the factors the agency considered when determining the basic working and employment conditions which applied to the agency worker at the time she/he allegedly did not receive the equal treatment they claim they were entitled to receive;
- relevant information which explains the basis on which the client's comparable employee was identified and the relevant terms and conditions applicable to that employee.

If the agency does not comply with this request, the agency worker can instead request a written statement from the client as to the information about the relevant basic working and employment conditions that apply to the client own workers, once 30 days from the date of the original request to the agency has passed.

Requests for information to the agency/client

If an agency worker believes that the right to access the client's collective facilities and amenities, or to receive information about client vacancies has been breached, the agency worker can request information directly from the client about the rights to access facilities and vacancies which is offered to the client's own workers. The agency worker can go directly to the client in respect of these rights without contacting the agency in the first instance.

What happens if the agency or client fails to respond to the request for information?

The failure to respond to an agency worker's request for information by either the agency or client may have serious consequences in the event that an agency worker makes a claim to an Employment Tribunal for either a failure to provide equal treatment (basic working and employment conditions) or failure to provide access to collective facilities and amenities and vacancies. If an Employment Tribunal finds that the agency or client deliberately and without good reason failed to provide the information requested, or that any written statement given in response to an information request is evasive or equivocal, it will be able to draw an inference that the agency worker's rights have been infringed.

4. Failure to comply with the contract terms for employed agency workers

Factsheet 7 explains that agency workers who are engaged by an agency under a permanent contract of employment that provides for pay between assignments shall not be entitled to equal pay provisions under the Regulations, provided that certain conditions are met.

In the event that the agency breaches one of the terms of the agency worker's contract or fails to comply with one of the relevant conditions relating to the use of the contract, the agency will be liable.

On the face of it, if the agency worker's contract does not meet the conditions that are required in order for the equal pay provisions to not apply, the agency worker may also have a claim in respect of the failure to provide equal treatment (basic working and employment conditions) if the rate of pay the agency worker received after the qualifying period is less than the rate of pay that is paid or would be paid to a client's directly engaged worker undertaking similar work.

5. Liability - right to not be unfairly dismissed/right to not be subjected to a detriment

Protection is provided for employed agency workers who are dismissed for asserting or seeking to assert certain rights associated with the Regulations. It will be treated as an automatic unfair dismissal (regardless of the agency worker's length of service) if an employed agency worker is dismissed on certain grounds.

These are that the agency worker:

- brings proceedings under the Regulations;
- gives evidence or information in connection with proceedings under the Regulations brought by another agency worker;
- requests a written statement on the treatment she/he received or should have received;
- alleges that an agency or client breached the Regulations;
- refuses to give up any of their rights under the Regulations; or
- is suspected by either the agency or the client to have done or to have proposed to do any of the above.

An employed agency worker will be able to bring a claim for unfair dismissal against the agency in an Employment Tribunal.

Additionally, if an agency worker (whether an employee or not) is subjected to a detriment by an agency or client as a result of any of the grounds above, the agency worker can bring a claim against the party responsible for causing the detriment (client/agency or both) in an Employment Tribunal.

6. Liability for breach of the anti-avoidance provisions

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.

In the event of an agency worker successfully pursuing a claim against an agency and or client for failure to provide equal treatment and the Tribunal finds that the either the agency or client arranged the agency worker's assignment in contravention of the anti-avoidance provisions (see Factsheet 3), the Employment Tribunal can award additional compensation of up to £5000.

7. Indemnifying clients for breaches of the Regulations

Given that the liability for various breaches of the Regulations may rest with the end user client as well as one or more agencies or other intermediaries involved in the supply of the agency worker, it is inevitable that parties will take steps to limit their liability through the use of indemnity provisions in contracts. This may be by introducing contractual provisions which specifically relate to the Regulations or very general provisions which are wide enough to deal with liability under the Regulations.

The REC recommends that agencies resist agreeing to terms with onerous indemnity provisions, particularly those which impose obligations on agencies to indemnify clients or other intermediaries for their own breaches of the Regulations.



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?

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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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