# Employed agency workers - when does equal treatment not apply?

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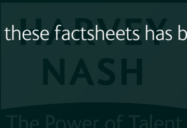

# Factsheet 7 - Employed agency workers – when does equal treatment not apply?

## 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 final in a series of 7 which will look at the Regulations in detail. They are 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

As set out in previous Factsheets under the Regulations agency workers will be entitled to new rights to receive equal treatment in respect of pay, conditions relating to working hours, access to a client's on-site facilities and the right to be informed of vacancies at a client.

However, agency workers who are employed by an agency will not have the benefits of all of these new rights. This is sometimes referred to as the "Swedish derogation" because of the similarities with employment practices in Sweden. This Factsheet will look at what rights employed temps will have and what conditions must be met to exclude them from parts of the Regulations.

## Employing agency workers

Generally agencies engage their agency workers under a contract for services rather than on contracts of employment. That means that those workers are not employees and do not enjoy the full range of employment rights which include:

- maternity, paternity and adoption leave;
- paid time off to attend ante-natal classes (although this right will be extended to agency workers under AWR in any case);
- time off to deal with family emergencies;
- protection from unfair dismissal;
- statutory minimum notice periods on termination of employment;
- the right to a statutory redundancy payment when the employee is made redundant;
- access to a stakeholder pension scheme to be provided by the employer;
- the right to be paid by the employer when undertaking health and safety training.

Unlike an employment contract, there is no "mutuality of obligation" between the parties to a contract for services, in that the agency is not obliged to provide work and the agency worker is not obliged to take work when offered it.

That said, many agencies already employ their agency workers rather than engage them on contracts for services. Typically, an employed agency worker will be required to attend work on a client's site as and when work is available, and will only be paid for time actually worked on an assignment. When no work is available, the contract terms will normally mean that the agency worker is not entitled to be paid. Although an employment contract does not offer the same degree of flexibility as a contract for services, the types of employment contract which agencies currently use will, as far as possible provide some degree of flexibility to cope with fluctuating demand.

## Employing agency workers for the purposes of the Regulations

Regulation 10 provides that the right to equal pay will not apply to agency workers who are engaged by the agency under a permanent contract of employment provided that the contract meets certain conditions. However the agency worker will still be entitled to equal treatment in respect of working conditions and will still be entitled to access any canteen or childcare facilities or any transport services facilities etc which the client provides and to be notified of vacancies by the client (for further details see Factsheet 4).

## Conditions applying to an agency worker's contract of employment

Only agency workers whose contracts of employment meet certain conditions will not be entitled to receive equal pay. Firstly the agency worker's contract of employment must commence before the

assignment starts. This means that an agency will not be able to engage an agency worker under a contract for services on an assignment but transfer him or her to a contract of employment at some point during the assignment. In this case, the agency worker will be entitled to receive equal pay on reaching the 12 week qualifying period (see Factsheet 3). The agency can however engage the agency worker on a contract of employment once that assignment has finished but before another commences. Once the contract of employment commences, the agency worker will not be entitled to receive equal pay during that assignment, though they will be entitled to the other elements of equal treatment under the Regulations.

The contract of employment must contain certain terms to meet the requirements of Regulation 10. These include:

- the minimum scale and rate of pay and how this will be calculated;
- the location or locations where the worker will be expected to work;
- the expected hours of work during any assignment;
- the maximum hours per week the worker may be required to work during an assignment;
- the minimum hours per week that the agency will offer the agency worker during an assignment, but this must be at least one hour;
- the type of work that the agency will offer the worker and details of any experience or qualifications required; and
- a provision that warns the agency worker that by entering into the contract of employment, the rights relating to equal pay under the Regulations will not apply.

Those agencies that already employ their temporary workers will be familiar with the different rights to which employed temporary workers are entitled compared to those engaged under contracts for services (see above). However, some agencies use a "zero hours" contract which essentially allows the agency to provide the agency worker with as many or as few hours of work each week as is available. The agency can terminate the contract and avoid paying the agency worker during the notice period, depending on the wording of the contract.

It is clear that these types of contracts will not meet all of the conditions set out in Regulation 10. Therefore agencies that wish to rely on the exclusion provisions will need to amend their current terms to:

- offer a minimum of one hour's work per week to the agency worker; and
- when no work is available, pay the worker for at least four weeks over the duration of the contract at the minimum rate of pay.

## The agency's obligations to pay agency workers between assignments and finding suitable alternative roles

An agency that employs its agency workers will have two obligations to those workers in order to comply with Regulation 10:

- in the event that no work is available and the agency is unable to place the agency worker in an assignment, the agency will be required to *"…take reasonable steps, to seek suitable work for the agency worker … [and] to offer the agency worker to … a hirer who is offering such work;"* and

- when suitable work is not available for the agency worker, the agency must pay the agency worker a minimum amount of pay (see below).

Importantly, an agency will not be able to terminate an agency worker's contract of employment, until it has met its obligations above for at least a period of four weeks during the course of the contract.

## The cost of employing agency workers

Agencies which are considering employing agency workers under terms which comply with Regulation 10 will need to consider all of the cost implications before they engage agency workers on such contracts. Even those agencies that already using contracts of employment may need to adapt their terms to comply with Regulation 10. There are two key cost implications to consider:

- the rate of pay which must be paid when the agency worker is not working; and

- the increased costs associated with employees generally.

## The rate of pay when the agency worker is not working

Regulation 11 sets out how to calculate the minimum rate of pay to be paid to the agency worker when she/he is not working. This must be at least 50% of the pay paid to the agency worker in the "relevant period," but this amount cannot be less than the applicable National Minimum Wage rate.

The 50% pay rate will be applied against the week or month (depending on whether the agency worker is paid weekly or monthly) in which the temporary worker had his or her highest earnings in the 12 weeks prior to the date that the previous assignment ended. For the purposes of calculating the rate payable, only payments in respect of basic pay (i.e. annual salary, payments for actual time worked or by reference to output) are taken into account. Any bonus payments made during the relevant period are excluded.

## Example 1

An employed agency worker's assignment ends on 1 November and despite the agency's best efforts, they cannot find a suitable assignment for him or her. The agency worker is paid weekly. The agency should count back 12 weeks from 31 October and identify the week in which the agency worker received the most pay. She/he would be entitled to receive 50% of this amount as the minimum rate of pay for each week during which she/he has no work, subject to a maximum of four calendar weeks during the contract.

### The National Minimum Wage floor

As stated above, the 50% pay rate is subject to a condition that it cannot be less than the applicable National Minimum Wage. This restriction will have a disproportionate effect in sectors that have hourly rates of pay close to the National Minimum Wage.

Below are three examples which demonstrate the impact of the 50% requirement on different rates of pay. The examples are based on an adult worker over the age of 22 who is entitled to the adult rate of National Minimum Wage which (at the time of writing) is £5.93 per hour and assume that the hourly rates given when the agency worker has no work have been calculated in line with Regulation 11.

## Example 1

The agency worker has an hourly rate of £12.00. 50% of this is £6.00 which will be the minimum rate of pay when the agency worker is not working. This is above the National Minimum Wage.

## Example 2

The agency worker has an hourly rate of pay of £9.00. 50% of this is £4.50 but this is below the National Minimum Wage. In this case the minimum rate of pay when the agency worker is not working will be £5.93 because the agency will not be able to pay less than National Minimum Wage. In this example, £5.93 equates to 66% of the hourly rate when the agency worker is working.

## Example 3

An agency worker has an hourly rate of £5.93. 50% of this is £2.97. Again the minimum rate of pay payable when the agency worker is not working will be £5.93 because the agency will not be able to pay less than National Minimum Wage. In this example, £5.93 equates to 100% of the hourly rate when the agency worker is working.

## Should an agency engage an agency worker on a contract of employment?

Many agencies (and clients) have expressed an interest in the possibility of agencies employing temps as a way of “getting round” the AWR. However, real consideration needs to be given to this option to avoid “jumping out of the frying pan and into the fire.” The impact of the Regulations will vary from sector to sector. In those sectors where agency worker pay rates are generally on a par with, or higher than the rates received by client’s own employees (for example IT or locum doctors), the Regulations are likely to have limited impact. In those sectors therefore, it may be completely unnecessary to start rethinking the way in which agency workers are engaged – losing the flexibility which comes with using temps engaged under a contract for services whilst incurring greater liability for no real benefit.

In other sectors where agency workers are generally paid less than the client’s own workforce (for example, in the care or industrial sectors), and where agency workers will frequently meet the 12 week qualifying period required for the Regulations to apply (see Factsheet 3), tight margins and pressure from clients may force some agencies to consider the employed agency worker option.

While some clients may no doubt see the benefit of using this type of contract, agencies need to ensure that there is sufficient provision in the margin to cover the following additional costs:

- the cost of paying the agency worker between assignments when there is no work available (see above);
- additional insurance, e.g. employers’ liability insurance;
- statutory redundancy payments (where applicable);
- wages to be paid when training is being undertaken for health and safety reasons;
- the cost of additional HR mechanisms to deal with employee issues e.g. disciplinary matters and grievances; and
- holiday pay – even when they are not entitled to equal pay, employed agency workers will still be entitled to parity in terms of other working conditions. Therefore where clients provide more generous holiday entitlement than the statutory minimum, the agency will still need to provide this to the agency worker and the cost of this should be covered by the margin (though this will be a commercial point between the agency and the client).

## The impact of the "Swedish Derogation" on the UK recruitment industry

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply where there is a "relevant transfer" e.g. a client outsources services, changes the supplier of certain services or a business is sold. TUPE protects the employment rights of the employees of the client, outgoing supplier or selling company when the relevant transfer takes place.

TUPE allows employees to transfer their employment from the outgoing service provider to the incoming service provider and there are strict rules about the way in which the transfer needs to be carried out. In the case of such transfers workers engaged under a contract for services do not enjoy the protection which is afforded to employees. If over time more and more agencies do opt to employ agency workers, there is likely to be an increase in circumstances in which TUPE arises and agencies will need to be mindful of this when negotiating contracts.

## 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**
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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.

This document has been created for REC members for information only. It is not a substitute for legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

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