Hogan Lovells

Agency Workers Regulations

Further information
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It reflects the law as it stood in July 2011.

Agency Workers Regulations

KEY POINTS

- The Agency Workers Regulations come into force in October 2011.
- After that date, agency workers will be entitled to the same basic working and employment conditions as permanent employees once they have completed a twelve week qualifying period.
- Basic working and employment conditions are those that relate to pay and working time entitlements, including holidays.
- Agency workers will also have the right to access collective facilities offered to permanent staff by a hirer and to be given information about job vacancies. These rights apply from day one of an assignment; there is no qualifying period.
- The new rights can be enforced through a complaint to the Employment Tribunal.

INTRODUCTION

Impetus for an agreement on the protection of temporary workers (usually referred to as agency workers) initially came from Europe. A draft Directive was proposed in 2002 which was designed to make sure that agency workers were entitled to receive the same "basic working and employment conditions" as a hirer's permanent workers. Agreement on the Agency Workers Directive (the Directive) was finally reached in May 2008.

Consultation about implementation of the Directive in the UK proceeded through 2009. The final version of the Agency Workers Regulations (the Regulations) was laid before Parliament in January 2010, and is due to come into force in October 2011.

WHO BENEFITS UNDER THE REGULATIONS?

An agency worker is defined as an individual who is either employed or engaged by an agency, which in turn supplies the worker to work for a hirer. It does not matter whether an intermediary is interposed between the agency worker and the agency or the agency and the hirer. For example, if an agency worker is engaged by an umbrella company, which provides his services to an agency, which in turn provides his services to a hirer, the worker will still be treated as an agency worker for purposes of the Regulations.

However, if the agency worker is genuinely carrying out a profession or business on his own account, he will not be entitled to equal treatment under the Regulations. The fact that an individual is operating through a personal services company does not necessarily mean that he is carrying out business on his own account.

WHEN DOES THE ENTITLEMENT TO EQUAL TREATMENT ARISE?

Agency workers are only entitled to equal treatment in relation to basic working and employment conditions once they have worked for the same hirer in the same role for twelve calendar weeks. This is known as the qualifying period. The placement does not have to be on a full time basis, so if a worker works one day a week for twelve weeks, they will have completed the qualifying period.

The qualifying period can be worked under one or more assignments and does not have to be with the same agency. For example, if an agency worker is placed with a hirer through one agency for six weeks and then another agency for six weeks, they will have satisfied the qualifying period requirement as long as they are working in the same role throughout. It will be assumed that a worker has been engaged in the same role unless they are engaged on a new assignment that involves "substantively different work or duties". The agency worker must also be told in writing what work is involved in the new role.

The Regulations contain complicated provisions dealing with the effect on the qualifying period of a break in an assignment or between assignments. In broad terms a break of six weeks or less (for any reason) will not break continuity. Longer absence for illness and maternity reasons, amongst other things, are subject to special rules.

Additional "anti-avoidance" provisions have been introduced to try and prevent hirers from adopting complex hiring structures to ensure a worker never completes the qualifying period. For example, if a worker is engaged:

- for twelve weeks on, six weeks off; or
- twelve weeks with one hirer and twelve weeks with an associated hirer; or
- swapped between different roles on a number of occasions

it could be assumed that the hirer has adopted that structure to try and prevent the worker acquiring equal treatment rights. If an agency worker complained that he had not been given equal treatment rights, the tribunal could find that the hirer has adopted the structure for the purposes of avoidance. The worker would then be treated as having equal treatment rights from the point he would have acquired them but for the structure adopted. The hirer could also face an additional penalty of up to £5,000.

Work performed before 1 October 2011 does not count towards the qualifying period. Once the Regulations come into force it will be important for hirers and agencies to keep

accurate records to ensure that they know when a worker acquires (or is about to acquire) equal treatment rights.

THE RIGHT TO EQUAL TREATMENT

Once an agency worker has completed the twelve week qualifying period, he is entitled to the "same basic working and employment conditions" as if he had been recruited directly by the hirer. Basic working and employment conditions are the relevant terms and conditions that are ordinarily included in employees' contracts of employment (whether by collective agreement or otherwise). "Relevant terms and conditions" relate only to pay and working time and holiday entitlements.

"Pay" has a wide meaning but a number of items have been specifically excluded from the definition, including the right to occupational pension, occupational sick pay, maternity, paternity and adoption pay, and redundancy pay. Bonuses that are "not directly attributable to the amount or quality of the work done by a worker and which [are] 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" are excluded, so do not have to be offered to agency workers. However, bonuses that are attributable to individual performance, such as schemes where an appraisal grade determines the level of bonus received, will amount to pay. Hybrid schemes, incorporating an element of both company and individual performance could in principle also be caught, depending on how the scheme is structured.

There is only a requirement for an agency worker to receive a bonus if a bonus would have been due during their time with the hirer had they been recruited directly. For example, if an employee has to have a year's service before he is eligible for a bonus, a hirer will be able to apply to same rule to an agency worker. An agency worker will not be able to demonstrate less favourable treatment if a permanent employee recruited at the same time would not have been treated any differently.

Agency workers will also be entitled to any additional holiday entitlement that is offered to permanent employees over and above the existing statutory entitlement of 28 days, to which agency workers are already entitled. Terms relating to working time, such as an entitlement to rest breaks, should apply to agency workers who have completed the qualifying period.

An agency worker's rights will be deemed to have been complied with if the agency worker is working under the same terms and conditions as a comparable employee. The comparable employee must be engaged in the same or broadly similar work as the agency worker.

DAY ONE RIGHTS

In addition to the equal treatment rights outlined above, agency workers have certain "day one" rights that it is the hirer's responsibility to provide. The main right is to be given the same access to facilities as other employees of the hirer. This would include collective facilities such as canteens, childcare, common rooms, parking and transport services such as transport between sites or to and from a station. Agency workers must be given access on the same terms as permanent employees; they do not need to be given preferential treatment. For example, if the hirer ran a creche with a waiting list, the agency worker would be entitled to go on the waiting list, but would not have a right to be offered a place immediately.

In contrast to the equal treatment right, hirers may be able to justify treating agency workers less favourably in relation to access to collective facilities. If the hirer can show that any less favourable treatment is a proportionate means of achieving a legitimate aim, it will not be a breach of the Regulations. This is generally quite a high hurdle to meet and cost alone is unlikely to be a sufficient reason to exclude agency workers from access to facilities.

Agency workers are also entitled to be informed of vacant posts in the hirer to give them the same opportunity as comparable employees to find permanent employment. This can be done by means of a general announcement in the place the agency worker is working, such as by putting a list of vacancies onto notice boards.

PREGNANT AGENCY WORKERS

Once an agency worker has completed the qualifying period, their rights during pregnancy will be very similar to those of a permanent employee. They will have the right to time off for ante natal care, which it is the agency's responsibility to pay. The hirer will still have to carry out a risk assessment to ensure the worker's health and safety during her pregnancy, as will the agency if the agency worker is an employee. If the assessment reveals a risk to health and safety, adjustments must be made to her working conditions/ working hours to avoid that risk. If adjustments cannot be made the agency must offer an available suitable alternative assignment or suspend the worker on full pay for the "likely duration" of the original assignment.

DEROGATIONS

The Regulations contain a derogation which some agencies and hirers might choose to rely upon. If an agency worker has a permanent contract of employment with a temporary work agency under which the employee is entitled to be paid between assignments at a rate of at least 50% of pay in the last assignment (or the national minimum wage if that is

higher), the right to equal treatment in respect of pay does not apply. The agency worker must be notified of certain matters in writing in advance, such as the nature of the work he will be expected to carry out under the employment contract. The agency worker must be told that the effect of the agreement is to remove his entitlement to equal treatment in respect of pay. To prevent abuse, the contract of employment cannot be terminated unless the employee has received at least 4 weeks' pay in aggregate during breaks in assignments. Rights to holiday and working time entitlements and access to facilities are unaffected by this derogation.

LIABILITY UNDER THE REGULATIONS

An agency worker can complain that he has been denied his rights under the Regulations by complaining to an Employment Tribunal. He also has the right not to be unfairly dismissed (if he is an employee) or to be subjected to a detriment because he has brought or supported proceedings under the Regulations or alleged that there has been a breach of the Regulations.

If an agency worker complains that he has not been given equal treatment, the Regulations provide that the hirer and agency shall be liable for a breach to the extent to which they were responsible for it. However, an agency will not be liable for a breach if it has taken reasonable steps to obtain information from the hirer about the basic working and employment conditions in the hirer and has relied on that information in determining what rights the agency worker is entitled to. The hirer would then be liable for any breach caused by the fact that it had provided inaccurate information.

In relation to the other rights, the agency is primarily liable for providing the agency worker with pay for time off for ante-natal care and for any changes necessary for health and safety reasons. The hirer is responsible for giving time off for antenatal care. As noted above, the hirer is also liable for any failure to give access to collective facilities or information about job vacancies.

Tribunals can order compensation which is "just and equitable" having regard to any breach and loss suffered as a result, and in respect of some claims a minimum of two weeks' pay. A tribunal cannot award compensation for injury to feelings.

EMPLOYMENT STATUS

One issue that the Regulations do not address is the vexed question of an agency worker's employment status.

Traditionally an agency worker has been regarded neither as an employee of the hirer nor of the agency (unless the agency has expressly entered into a contract of employment with the worker). A few years ago the Court of Appeal said that it might be possible to "imply" a contract of employment between an agency worker and a hirer, particularly in circumstances where the agency worker had worked for that hirer for a number of years. However, the orthodox approach has now been re-established and the current position is that it would be rare for it to be appropriate to imply an employment relationship between an agency worker and a hirer.

This means that an agency worker will generally not be able to claim unfair dismissal or a redundancy payment against a hirer in the event that their services are no longer required by that hirer.

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