The Agency Workers Regulations 2010

Impact Assessment Guide

Section 1

A Hirer's Guide

Produced by the Association of Professional Staffing Companies (APSCo)

www.apsco.org

Contents

The APSCo Impact Assessment Guide is made up of three sections, and these are available in three separate publications as listed below.

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Sections 1 & 2	A Hirer's Guide to the Agency Workers Regulations 2010 & AWR Risk Assessment Toolkit for Members	This includes the Hirer's Guide, for members' reference when undertaking the Risk Assessment	Members
Sections 1 & 3	A Hirer's Guide to the Agency Workers Regulations 2010 & AWR Impact Assessment Toolkit for Hirers	This includes the Hirer's Guide for reference when members assist their end-user clients in undertaking the Impact Assessment.	Hirers & Members

Before undertaking an Impact or Risk Assessment, we would strongly recommend that you read the information contained within Section 1.

This Impact Assessment Guide is for use by APSCo members only, and their clients. The facts, information, and opinions contained herein are correct to the best of APSCo's knowledge as at time of publication. However, this is intended as a concise, introductory guide to the new legislation, and not as a substitute for legal advice. The aim of this guide is to help members and their clients prepare for this legislation by providing an overview of the Agency Worker Regulations 2010 ("Regulations"), and to pinpoint some of the issues surrounding the impact and risks presented by it. This document is not an exhaustive and complete reference document for the Regulations. The Regulations can be downloaded at http://www.legislation.gov.uk/uksi/2010/93/contents/made.

UK Government guidance on the Regulations will be available prior to October 2011, details of which will be confirmed to members once the guidance has been published.

This is a complex new legal area giving rise to a range of new rights for "Agency Workers". There will not be a "one size fits all" approach, and the risks and compliance requirements will vary by sector and type of supply arrangement. Members and their clients are therefore recommended to seek their own specialist legal advice on how the Regulations will affect their supply, use, and cost of agency workers.

APSCo can be contacted at info@apsco.org or on 08458 997388.

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A Hirer's Guide to the Agency Workers Regulations 2010

APSCo has produced this guide, as at February 2011, to provide an overview to hirers of the impact the Agency Workers Regulations ("Regulations") will have on them if they engage the services of individuals supplied via a third party such as an employment business. This legislation comes into force in October 2011, so it is important to start looking at these issues now.

This document gives an overview of the Regulations, and more detailed guidance covering specific areas will be published over the coming months.

Hirers should be aware that this is new legislation, and as such its interpretation may change over time, and that the guidance included within this document reflects current thinking.

The Agency Worker Regulations

The main principle of this new legislation is to give equal treatment to those temporary workers defined by the Regulations as agency workers, in line with comparable permanent employees or directly recruited workers, with regard to pay and certain other working conditions after 12 weeks in an assignment.

Although there are some day one rights, to qualify for equal treatment with regard to pay the agency worker must have been engaged by the hirer, in the same or similar position, for a period of 12 continuous calendar weeks ("qualifying period"). There are circumstances in which this qualifying period is paused, examples of which are explained in more detail within this document but generally the qualifying period will accrue unless there is a break of at least 6 calendar weeks.

It is not the intention of this legislation to give preferential treatment to agency workers over and above that given to permanent employees or directly recruited workers. It is important to note that the Regulations do not give agency workers employment status.

Terminology

"**hirer**" means a person or organisation to which individuals are supplied to work temporarily under that person's supervision and direction. An end user client using an employment business, master vendor or other staffing company to supply temporary workers will be a hirer.

"**agency worker**" means an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and who agrees to perform work and services personally for the agency. See later section on **"Individuals potentially outside the scope of the Regulations"**.

"**temporary work agency**" means a person who supplies individuals to work temporarily for and under the supervision and direction of hirers, and who pays for, or receives or forwards payment for the services of such individuals. Note that a person or organisation does not need to be an employment business – other intermediaries such as umbrella companies and group companies supplying staff within a group may also be temporary work agencies.

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Application of the Regulations

The Regulations apply to all **temporary workers who are supplied to work for and under the supervision and direction of a hirer**, and supply is made under a contract of employment or any other contract to perform work and services personally.

New Rights to which Agency Workers will be Entitled

From Day One of their Assignment

The agency worker will have certain entitlements from day one of their assignment. With effect from 1st October 2011 all agency workers will be entitled to:

- be informed by the hirer of relevant job vacancies within the hirer's organisation; and
- access to collective facilities and amenities, including canteen or other similar facilities, childcare facilities, and transport services.

These entitlements will not be subject to a qualifying period, and must be available to the agency worker from the first day of their assignment. Access to such facilities can be refused if there are objective grounds for doing so, and no preferential access is implied. For instance if there is a waiting list for childcare facilities, then the agency worker would be entitled to join the waiting list on the first day of their assignment, but must wait their turn for a place to become available.

Benefits such as season ticket loans, and childcare vouchers are not generally classed as amenities and are therefore not included in these day one entitlements. However, the difference between an amenity and an employment benefit will not always be clear and so hirers will need to refer to any UK Government guidance and future case law on this point.

After the Qualifying Period

Agency workers will be entitled to the same basic working and employment conditions as a comparable permanent employee or directly recruited worker, which includes:

- pay, being any sum payable to the worker, including any fee, commission, bonuses, overtime, shift allowances, payment for annual leave (including over and above the statutory entitlement), and other payments which are directly attributable to the amount or quality of the work undertaken by the agency worker ("Pay");
- The duration of working time, rest breaks, rest periods and night work; and
- Annual leave (including over and above the statutory entitlement). Note that the right to take the leave is in addition to be paid for such leave. The Government has indicated that where the annual leave entitlement exceeds the statutory minimum (currently 28 days including public holidays) payment for the additional leave can be paid in lieu of the agency worker taking such leave. Equal treatment will, however, require agency workers to be given the same right and opportunity to take the full leave entitlement if they choose to do so.

Benefits not within Scope

It is not the intention of the new Regulations to change the employment status of agency workers, and their rights to equal treatment will not include all the benefits to which permanent employees are entitled.

What Pay Doesn't Include

- Redundancy pay.
- Maternity, paternity or adoption leave pay (although note that agency workers may still be entitled to statutory maternity/paternity/adoption leave and pay).
- Occupational sick pay (although statutory sick pay may apply).
- Company pension schemes (although note that forthcoming pensions legislation will introduce new pension rights for agency workers).
- Financial participation schemes.
- Bonus payments that are not directly attributable to the amount or quality of work done by an individual and which are given to encourage the individual's loyalty or to reward long-term service.
- Pay for time off for carrying out trade union duties.
- A statutory guarantee payment (e.g. payable during a lay-off period).
- Any advance of pay or a loan.
- Any expense incurred in carrying out the employment.
- Any payment to a worker other than in that person's capacity as a worker

Please note that unless the statutory right is expressly excluded under the Regulations any statutory entitlements currently available to agency workers will apply and remain unaffected by this new legislation, e.g. if an agency worker meets the relevant criteria they will be entitled to receive Statutory Sick Pay but any occupational sick pay over and above statutory will be excluded.

Hirers will need to identify which pay and benefits payable to a comparable person are within Pay for the purposes of the Regulations. They will then need to provide full details of the different pay elements to their staffing suppliers, and determine whether a fee increase is required to equalise agency worker pay.

The Qualifying Period

An agency worker's services must have been engaged for a period of 12 continuous calendar weeks working in the same role with the same hirer before they have the right to equal treatment (with the exception of their day one rights explained above). The qualifying period is irrespective of whether an agency worker works full or part-time. For example an agency worker may only work one day a week, but they will still be entitled to equal treatment after 12 weeks on assignment.

A new qualifying period will begin when there is a break of six calendar weeks or more between assignments in the same role, or, where the agency worker takes on a new assignment with the same hirer, which is substantively different to their previous role.

A substantively different role will be one where the main work or duties are different from those required in the previous role and where the agency worker has been informed in writing by the temporary work agency of the type of work they will be required to do in the new role, e.g. if the role is at a different level of seniority or responsibility.

There are circumstances in which the qualifying period may be paused, and then restarted once the agency worker returns to the assignment. These include:

- A break of less than six calendar weeks
- Sickness Absence
- Annual Leave
- Shutdowns – factory closures/school holidays
- Jury Service
- Industrial Action

Where the agency worker is absent from their assignment due to pregnancy, childbirth, or maternity related absence (during the period from the start of a pregnancy to 26 weeks after childbirth, or when the agency worker returns to work) or for statutory or contractual maternity, adoption, or paternity leave to which the agency worker is entitled the qualifying period will continue to accrue during the agency worker's absence for the original intended duration or likely duration of the assignment, whichever is the longer. This will also apply to maternity, paternity, and adoption leave where the agency worker has a contractual entitlement, whether statutory or otherwise to such leave.

Engaging agency workers on assignments of less than 12 weeks, and replacing them with different agency workers, or using the 6 week break to break the qualifying period is not expressly prohibited within the Regulations. However, there are anti-avoidance measures for situations where the most likely explanation for the structure of more than two assignments involving the same role and carried out by an agency worker for the same hirer, or within the hirer's group is to deprive them of their rights under the Regulations.

Workers Potentially outside the Scope of the Regulations

Not all individuals working through employment businesses will fall within scope. The **genuinely self-employed** (in business on their own account), and those working under the supervision and direction of the **supplier** rather than the hirer will not fall within scope.

Although **limited company contractors** are not expressly excluded, the definition of agency worker excludes arrangements where the contract the individual has with the temporary work agency has the effect that the status of the temporary work agency and/or the hirer is that of a client or customer of the limited company or self-employed contractor.

Although the Regulations do not affect tax law and tax status the tests used to assess whether an individual is genuinely self-employed are similar. It is likely, therefore, that limited company contractors working within IR35 will be agency workers and that those working under arrangements which fall outside IR35, will not.

Managed service arrangements, whilst not expressly excluded, will fall outside scope unless, in reality, the hirer rather than the management service provider supervises and directs the staff. Simply placing a supplier representative on a hirer's site will not be enough to turn the supply into a managed service – contractual and actual responsibility for supervising and directing the staff must be with the service provider and not the hirer.

So Who is Likely to be Outside Scope?

A simplified answer to this question, based on the majority of individuals likely to be supplied by APSCo members is:

Limited Company Contractors, who are outside IR35.

Umbrella company workers will almost certainly fall within scope unless they clearly do not work under the supervision and direction of the hirer. They may, however be taken out of scope for the purposes of equal Pay if they are employed by the umbrella company in accordance with Regulation 10 of the Regulations – "Permanent contracts providing for pay between assignments" - often referred to as the "Swedish Derogation" or the "pay between assignments" model.

What is the Swedish Derogation?

Where an agency worker is employed under a permanent contract of employment with a temporary work agency (including an umbrella company) and the conditions set out in Regulations 10 and 11 are met, the agency worker will fall outside the scope of the Regulations in relation to their rights for equal Pay.

These conditions include, but are not limited to the requirement that during any period during which the worker is not working, but is available to do so the employing temporary work agency must take reasonable steps to seek suitable work for the worker, and pay the worker a minimum amount in respect of that period. The minimum amount is 50% of basic pay paid to the agency worker based on the highest level of pay paid within the 12 weeks immediately preceding the end of the previous assignment or during the assignment if less than 12 weeks. This payment must not be less than the National Minimum Wage.

The temporary work agency may not terminate a contract of employment with an agency worker until it has complied with the conditions stated in the paragraph above for an aggregate of not less than four calendar weeks during the contract.

For a complete list of the conditions, which must be met under Regulations 10 and 11 please see the Regulations, which can be downloaded at http://www.legislation.gov.uk/uksi/2010/93/contents/made.

All other rights such as day one rights, annual leave and working time rights will still need to be equalised.

Hirers and employment businesses are recommended to seek specialist legal advice before relying on the Swedish Derogation. Hirers and employment businesses should also consider how the employing temporary work agency will fund payments between assignments.

Establishing a Comparator

An agency worker is entitled to the same basic working and employment conditions as they would be entitled to for doing the same job had they been recruited directly by the hirer – this is referred to as the "as if" test.

- The "as if" test requires the hirer to confirm what terms and conditions the worker would have been entitled to had they engaged them directly – there is no absolute requirement for the hirer or an agency worker to identify a "flesh and blood" comparator.

- However, the "as if" test will be deemed to have been complied with where the agency worker is working under the same relevant terms and conditions as an employee doing the same or broadly similar work (having regard, where relevant to whether they have a similar level of qualification and skills), and who is working or based at the same establishment as the agency worker.

- If there is no comparable employee working at the same establishment then the comparison needs to be extended across different establishments.

- Terms of established pay scales, collective agreements, national agreements and established custom or practice can be used to provide comparator information.

- In most cases a hirer will be able to apply the "as if" test, but there will be some situations in which a hirer will be able to justifiably say that they would never take a worker on direct to do that type of work. If there is no comparator then there is no requirement to provide equal treatment. However if an agency worker brings a claim the employment tribunal will have to consider whether or not the hirer should have applied the "as if" test. Hirers therefore need to consider roles carefully before relying on them being out of scope due to an apparent lack of a comparator within their directly engaged workforce.

Where agency workers are paid more than their comparator, then no action needs to be taken with regard to Pay. However, the agency worker will still be entitled to other equal treatment, such as comparable annual leave (see **New Rights to Which Agency Workers will be Entitled**, above).

It is also important to remember that Pay may include more than just the hourly/daily/weekly rate. For example performance-related bonuses payable to a comparator will need to be considered. Pay will not be assessed on a complete package basis – each element of Pay will need to be separately identified and quantified, and so even if an agency worker gets paid more than their comparator on an hourly/daily/weekly rate basis the agency worker will still have a right to equality of pay in relation to other elements of Pay such as bonuses and holiday pay.

Potential Liability of the Employment Business and the Hirer

This is a complex issue and one that will become clearer only once the employment tribunals start to consider liability for breach of these Regulations. The temporary work agency that pays the agency worker will be at least partly liable for any breach but, depending on the circumstances, other parties in the supply chain, and even hirers may also share liability.

Where a temporary worker agency can show that:

- it acted reasonably in obtaining or trying to obtain the required information from the hirer, or the temporary work agency in the next tier up the supply chain; and
- it acted reasonably on information received from the hirer, or other temporary work agency to determine equal treatment; and,
- based on the information received, it extended the same basic working and employment conditions to the agency worker,

but, nevertheless an employment tribunal concludes that the agency worker has not received equal treatment, then it is possible that the temporary work agency will not be liable for a breach.

The Regulations make it clear that where more than one temporary work agency is party to a claim the employment tribunal will have regard to the extent to which each temporary work agency will be responsible for the breach. This is an important point in relation to the types of supplies made by APSCo members because supply claims often include an umbrella company, an employment business, and a master vendor. Dependent upon the facts all three suppliers could potentially share liability for breach of the Regulations.

In certain cases the hirer may be liable, particularly if they have refused to provide accurate comparator information.

It should also be noted that liability in relation to an agency worker's access to collective facilities and amenities will be the hirer's.

This highlights the absolute importance of the flow of information between hirers and temporary work agencies particularly in situations, such as master vendor arrangements, where there are more than two parties in the chain.

It will be essential for each temporary work agency to fully understand your pay and benefits structure, in what circumstances these are made available, and how comparators are appraised. We would hope that your employment business already has a thorough understanding of your business culture and needs, but the new Regulations will mean that this relationship will be vital in ensuring compliance.

If you work closely with your employment business complaints from agency workers should be dealt with quickly, reasonably, and to the satisfaction of all parties. Note that as a hirer, unless you deal with the temporary work agency that actually engages and pays the agency worker, you will need to ensure through your contracts that the comparator information and equalising payments are passed down the supply chain to the temporary work agency that actually pays the agency worker**.** Ultimately information flows will be a matter of contract and so hirers and APSCo members will need to revisit and update their supply terms to address the Regulations.

APSCo will be updating its model terms in respect to the Regulations, which will be available to all APSCo members before October 2011.

In the event that an agency worker presents a complaint to an employment tribunal, and it is upheld, please be aware of the following.

Employment Tribunals will have the power to

- make a declaration as to the rights of the agency worker and recommend action to be taken;
- order compensation of not less than two weeks' pay to be paid. Such compensation may be split between parties dependent upon their responsibility for the infringement;
- order additional compensation of no more than £5,000 where measures were taken to prevent the agency worker from being entitled to equal treatment by structuring assignment patterns in order to avoid the qualifying period;
- join all temporary work agencies and the hirer to the claim.

What should you do next?

Now that the Regulations will not change materially, and we have a better understanding of the form and content of the guidance, we feel it is time to encourage hirers to start to take some action.

Firstly we would recommend that you undertake an impact assessment to fully understand how the Regulations will affect the use of temps, contractors and other non-directly engaged individuals working for your organisation. For larger companies this may be a complex and time-consuming exercise with which you may require help from your recruitment agencies.

To help you with this, we have produced an **Impact Assessment Toolkit**, which provides information and advice on how to assess which temporary resource will fall within the scope of the Regulations.

APSCo
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APSCo would like to thank Samantha Hurley of Reviewpoint Consulting Limited, and Osborne Clarke for their work on this guide.