
Impact assessment checklist

Agency Worker Regulations 2010

This document is intended to assist REC members and their clients plan ahead for the Agency Worker Regulations (“the Regulations”) which will come into force on 1 October 2011. This impact assessment checklist is one of a number of documents contained in the REC’s AWR Toolkit. Members should also read the following Factsheets which set out in detail the requirements of the Regulations:

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?

In the REC’s discussions with clients, initial reactions have often been to look at radically changing current resourcing models. However, following more detailed analysis of current pay rates and methods for establishing the right comparisons, those same clients have found that implementing equal treatment measures do not necessarily entail the significant impact on direct costs that were initially envisaged.

The first stage of the implementation process is therefore to evaluate the potential impact of the Regulations in terms of cost, risk and working relationships with clients and other links in the supply chain. The following questions are intended to act as a prompt and to help employment businesses and their clients implement the Regulations in a legally compliant and cost-effective manner.

1. Use of temporary workers

- 1.1 Is the client a heavy user of temporary workers or does the client only use the agency on an ad hoc basis? This may determine how much you need to engage with your client prior to the implementation of the Regulations.

2. Assignment lengths

- 2.1 What are the current average lengths of assignments?
- 2.2 What proportion of assignments last more than 12 weeks?

In order to qualify for equal treatment in terms of pay and working conditions, agency workers must work for 12 weeks in the same role at the same client. The right to access collective facilities (such as canteens, childcare and transport services) commences on day 1 of an assignment (see section 7 below). Therefore the length of assignments will determine whether an agency worker will qualify for equal treatment but will not affect his/her entitlement to the day 1 rights. See Factsheet 3 for further details.

- 2.3 If assignments are relatively short, are they either regularly extended or regularly repeated?
- 2.4 Is there an average break period between assignments? If yes, what is it?
- 2.5 Are breaks between assignments of varying lengths and ad hoc?
- 2.6 Where there are breaks in assignment, does the agency worker usually go back into the same role at the client or are there a variety of roles which one agency worker can undertake?

The qualifying clock will be suspended where there is a break of less than 6 weeks. It will be stopped entirely if there is a break of 6 weeks or more, except in certain circumstances. Therefore even if assignments are short if they are regularly repeated they will count towards the 12 weeks period unless there is a 6 week break period. (See Factsheet 3 for further details.)

A new qualifying clock will commence for each new role the agency worker undertakes at the same client. (See Factsheet 3 for further details.)

Please note that the Regulations contain some anti-avoidance measures. Agencies and/or clients that structure assignments in a way as to deliberately prevent an agency worker acquiring the right to equal treatment may be liable for a fine of up to £5000. See Factsheet 5 for further details.

3. Employment status of temporary workers supplied to the client?

- 3.1 What is the status of the temporary workers you currently supply or propose to supply to the client?
- 3.2 Are they genuinely self-employed? Are they engaged via limited companies whether their own limited companies or umbrella companies?

Genuinely self-employed workers are excluded from the scope of the Regulations. However neither agencies nor clients should assume that because an agency worker works via a limited company that s/he is genuinely self-employed. Agencies will have to consider looking at all the relevant factors whether an individual is indeed an agency worker or whether s/he is outside the scope of the Regulations. Equally, just because someone does not work through a limited company does not mean that she/he is an agency worker. See Factsheets 1 and 2 for further details.

3.3 Does the client use more than one agency to engage temporary workers?

Agency workers accrue qualifying time when they work in the same role for the same client. They do not have to be supplied by the same agency. Therefore agencies and their clients need to work out how to track time accrued by agency workers working through more than one agency – there is no obligation on an agency worker to inform the agency that she/he has worked at the client previously and has accrued qualifying time. (See Factsheet 3 for further details)

3.4 Are there intermediaries in the supply chain including master or neutral vendors? If not now, does the client propose introducing a master or neutral vendor arrangement in the future?

3.5 Does the client use a managed service arrangement for some or all of its workforce?

Intermediaries such as master or neutral vendors and umbrella companies are “temporary work agencies” for the purposes of the Regulations. Where such structures are in place, all links in the supply chain will need to consider how equal treatment measures will be implemented and monitored. It will be crucial that master and neutral vendors assist the second tier suppliers to comply with the Regulations. If an agency worker brings an employment tribunal claim, claiming that she/he has not received the equal treatment to which she/he was entitled, all links in the supply chain are potentially liable – the tribunal will decide on liability and will apportion any compensation accordingly. (See Factsheet 6 for further details)

Managed services are outside the scope of the Regulations.

Agency workers who are employed by the agency are not entitled to equal pay though they are entitled to access the client’s collective facilities and information on job vacancies. (See Factsheet 7 for further details)

4. Pay and benefits

NOTE: The obligation is on the agency to ensure that the agency worker receives equal treatment in terms of pay and working conditions. It is down to a commercial negotiation between the agency and the client as to whether the client will contribute towards the agency’s financial obligations either in whole or in part.

4.1 What are the current rates of pay paid to agency workers? (You will need to break this down into categories of worker based on type of work, skills or seniority where relevant)

For the purposes of the Regulations “pay” includes basic pay but also some bonuses, shift premia and overtime. Therefore the agency needs to fully understand the client’s pay structures.

- 4.2 How does this currently compare with equivalent direct recruits? Does the client operate formal pay bands?

Where there are formal pay bands, this will involve comparing the current pay rates with entry level pay rates. Where no formal pay bands are currently used, this may involve looking at the pay rates of existing staff doing the same or similar work. (See Factsheet 3 for further details)

- 4.3 What are the current overtime rates being offered to direct recruits? How do these rates differ from the overtime rates currently offered to temporary workers?
- 4.4 What bonus payments and commissions are currently offered to direct recruiters and may need to be applied to temporary staff?

Certain bonus payments and commissions are included in “pay” for the purposes of the Regulations. (See Factsheet 3 for further details)

5. Holiday entitlements

- 5.1 What holidays are the client’s directly engaged workers entitled to?

Temporary workers are entitled to receive statutory holiday of 28 days. Under the Regulations agency workers will be entitled to the same holiday entitlement as if they have been directly recruited by the client, even where this exceeds the statutory entitlement.

Holiday entitlements can increase with seniority. The relevant holiday entitlement for the purposes of equal treatment will depend on the holiday entitlement the client would give to a comparable employee, or if there is no comparable employee, an individual whom it would directly engage into that role. (See Factsheet 3 for further details)

6. Collective facilities and permanent employment opportunities

- 6.1 What collective facilities are currently open to the client's own directly engaged workforce?
- 6.2 Which, if any, of these collective facilities are currently available to temporary workers?

Agency workers will have the right from day 1 of an assignment to access to the client's collective facilities such as canteens, gyms, crèches, car parking and free transport. If the client does not extend these collective facilities to agency workers the end user will need to be able to objectively justify why this is not the case. (See Factsheet 3 for further details)

- 6.3 How does the client advertise internal vacancies? Are there notice-boards or intranet sites that all workers at its site(s) have access to?

From day 1 of an assignment, agency workers are also entitled to access information on job opportunities within the client's organisation. Importantly, there is no obligation on the client to shortlist, interview or directly engage an agency worker. (See Factsheet 3 for further details)

7. Maternity rights for agency workers

- 7.1 What proportion of the client's workforce is female?
- 7.2 What sort of roles does the client have? If a pregnant agency worker's assignment is terminated, will the agency be able to source suitable alternative work at that client or will they have to find suitable alternative work elsewhere?
- 7.3 Are there any health and safety issues at the client's site(s) which may pose particular concern to pregnant agency workers and which may mean that their assignments must be terminated?

Pregnant agencies workers will enjoy new rights under the Regulations, in particular the right to paid time off for ante-natal appointments and where an assignment has been terminated on pregnancy related grounds, the right to be found suitable alternative work or to be paid for the remainder of the expected duration of the assignment which was terminated. (See Factsheet 6 for further details)

8. Limiting the risk of tribunal claims

8.1 What current mechanisms are in place to deal with complaints from agency workers?

An agency worker who believes that s/he has not received his/her equal treatment entitlements can make a written request to the agency for further information. The agency must respond within 28 days, failing which she/he can make a similar request to the client.

An agency worker can make a complaint to an employment tribunal that they have not received their equal treatment entitlements or that either the agency or client have breached the Regulations in some other way.

Therefore agencies should have appropriate procedures in place to firstly deal with any complaints, and secondly to deal promptly with any written requests for information. Effective procedures will play a key role in minimising the risk of tribunal claims.

8.2 Has the client recognised one or more unions? How does the client engage with the union(s)? What is the state of relations with the union(s)?

The debate on agency work has been heavily politicised and there will be pressure to show that the Regulations are making a difference on the ground. Therefore it may be a good idea for agencies and clients to engage with the union(s) at an early stage to discuss implementation plans.

Conclusion

Implementing equal treatment measures do not necessarily entail a significant impact on direct costs or increase the risk of employment tribunals. The areas covered above will act as a 'prompt' for conducting the initial assessment of what the regulations will mean in practice.

The extent that the regulations do impact on direct costs will determine the need to look at possible new structures and ways of sourcing and managing temporary and contract staff. An effective impact assessment is the first stage of the planning process and should kick-start a process or regular dialogue and active engagement between employers and their recruitment providers.

REC

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