Factsheet 2 - Exclusions for Limited Company Contractors and self-employed workers

The Agency Workers Regulations 2010 – Briefing for REC Corporate Members

The Agency Workers Directive is a piece of European legislation which became law on 5th December 2008. All EU member states have 3 years from that date to implement the Directive via their own national legislation. In England, Wales and Scotland, the Directive will be implemented via the Agency Workers Regulations 2010 ("the Regulations") which will come into force on 1st October 2011. Northern Ireland will draft separate legislation which is expected to come into force at the same time. 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 2nd 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 client's 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

The Regulations are not intended to apply to genuinely self-employed workers. Not all workers who work through a limited company are genuinely self-employed and not all genuinely self-employed work through a limited company.

This Factsheet looks at the issues agencies need to look at when considering whether an individual who works through a limited company or who claims to be self-employed is inside or outside the scope of the Regulations.

1. What does the EU Directive say?

Article 5.1 of the final EU text says:

".....This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction".

Note that there is no express exclusion for limited company contractors in the Directive. Rather this is something which the Department for Business, Innovation and Skills (BIS) have sought to deal with within the Regulations.

2. How has the Directive been implemented in the UK?

The Government's initial position as outlined in the first consultation document (Summer 2009) was that the UK regulations should exclude "workers who are genuinely one of the following: the self-employed; those working through their own limited liability company; or those employed on managed services contracts" .

Despite trade union concerns over possible abuse and "bogus self-employment", the Government concluded in the second consultation (Oct – Dec 2009 "the Second Consultation") that the *"underlying policy intention set out in the previous consultation is appropriate and that the Regulations should remain broadly as drafted"*. On the issue of "sham" self-employment, the Government concluded that *"the courts and tribunals are capable of determining employment status and identifying such avoidance mechanisms"*[1] .

In our response to the Second Consultation, REC proposed wording which would have specifically excluded limited company contractors working through their own limited companies. Unfortunately the Government has not accepted our text in full and Regulation 3 which defines who is an agency worker, and thus who is in scope of the Regulations, remains unclear. The Government argues that a general provision to automatically exclude *"anyone who has a shareholding or holds office in a limited company could make it easier for unscrupulous parties to set up business models (…) to circumvent the protection of individuals under the Directive"*.

3. What is the REC's interpretation?

Limited company contractors working through their own corporate vehicle:

The Government's stated intention is that workers who are genuinely in business on their own account will not be within scope of the Regulations. Similarly, the intention is that managed service contracts (i.e. those where the supplier rather than the hirer, manages or directs staff) are outside scope unless, in reality, the user, rather than the manager service, supervises and directs

[1] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/awd-consultation.pdf. pp. 14-15.

the staff. However, there is no express exclusion for agency workers working through their own limited company. Essentially any worker could be outside the scope of the Regulations if they are in business of their own account, regardless of whether they work through their own limited company or not.

Therefore the focus will be on the relationship which exists between the contractor's company and the end user client and or the agency.

The provisions contained in the Regulations mean that a contractor working through a personal services company will not be deemed to be within scope if:

- the contract that he or she has with the agency is such that the agency would be deemed to be a client or customer of the contractor's company; or

- under the terms of a contract (for example the upper contract which exists between the agency and client or the lower contract which exists between the contractor's company and the agency), the end user client would be deemed to be a client or customer of the contractor's company.

Thus an agency will have to assess on balance whether the contractor will be deemed to have met these conditions in respect of each assignment. In the event that an agency worker makes a claim for equal treatment, which proceeds to the employment tribunal, the tribunal will have then also to weigh up on balance whether that individual is in business on his own account or not.

Most professional contractors will of course be familiar with the tests applied to determine whether or not they are likely to be caught by IR35. IR35 captures those contractors who, but for the existence of the intermediary would be deemed to have a contract of service with the end user client, i.e. an employee of the client. The Regulations in contrast not only apply to individuals who could be deemed to have a contract or employment but also individuals who might fall into the wider category of worker under any other type of contract which requires them to provide their services personally.

So the issues which will be relevant to limited company contractors are (i) whether or not there is an obligation of personal service and (ii) whether the contractor is deemed to be self-employed, i.e. whether the agency or end user client will be seen to be the contractor's client or customer.

4. Self-employed or not?

In assessing the (self-) employed status of an individual an employment tribunal is likely to examine the following:

- the express terms agreed between the parties in both the upper and lower contracts;
- the degree of autonomy that the contractor has in determining how the work is undertaken;

- the degree of supervision, if any, that the end user client exercise over the contractor;
- whether the contractor prepares and submits his own accounts to HMRC;
- whether the contractor is entitled to be paid during periods where no work is being carried out;
- the level and degree of financial risk which the contractor is exposed to under the contract(s) and the extent to which the contractor is able to increase his own profit;
- whether there is a contractual requirement for the contractor to provide services personally (although the fact that this requirement exists will not in itself rule out that the hirer or agency are clients or customers of the contractor's company);
- whether the contractor supplies tools, equipment, materials for the purpose of the assignment;
- whether the individual is obliged to work exclusively for one client or whether they can in fact work for more than one client at a time;
- whether the individual has fixed hours of work or whether they can choose when they work.

5. Limited company contractors working through an intermediary which is not their own corporate vehicle:

Agency workers supplied via umbrella companies or other intermediaries are not prevented from being an agency worker (Regulation 3(5)). This means that Individual A, who is self-employed but who chooses to work through an umbrella (because for example, he does not wish to administer his own corporate vehicle), is not within the scope of the Regulations. Individual B, who is not self-employed but works through an umbrella (perhaps for perceived tax benefit reasons) is within scope of the Regulations.

The fact that the Government decided not to apply an automatic exclusion for limited company contractors may raise some concerns. However, the REC's discussions with BIS has confirmed that the overall policy intention is to limit the impact on areas such as IT where workers are genuinely self employed. The REC will push for more clarity on this whole area to be included in the official guidance document that will underpin the Regulations.

REC Legal

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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?