Factsheet 6 – Maternity rights under the Agency Workers Regulations

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 6th in a series of 7 which will look at the Regulations in detail. They have been written to 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

The Regulations will provide agency workers with the right to equal treatment in terms of pay, working conditions, access to client on-site facilities and job vacancies. Additionally the Regulations will make changes to existing employment legislation to extend some maternity rights to agency workers, which presently only apply to employees.

In this Factsheet, we look at the maternity rights that Regulations will introduce for agency workers and the implications for agencies.

1. Time off to attend ante-natal appointments

An agency worker who is pregnant will be entitled to take paid time off from her ''working hours'' to attend an ante-natal appointment when she is advised to do so by her GP, midwife or nurse.

This is identical to the right that a pregnant employee currently has. If asked, the agency worker will be required to provide evidence of her appointment to the agency or client (an appointment card or some other document showing the appointment has been made will suffice), although this is not required for the first appointment.

1.1 Payment when attending an ante-natal appointment

An agency will be required to pay an agency worker for time that she has to take off from an assignment in order to attend her ante-natal appointment. The payment will be the agency worker's hourly rate applicable to that assignment and must be paid for each hour that she misses of her assignment. The legislation provides for the agency worker's hourly rate to be calculated by averaging the hours worked per week of the previous 12 weeks if the hours applicable to that particular assignment vary from week to week.

1.2 Conditions which apply

An agency worker will only be entitled to paid time off to attend an ante-natal appointment once she meets the same 12 week qualifying criterion which applies to equal treatment (see Factsheet 3). If the agency worker is an employee of the agency (i.e. she is engaged under a contract of employment) rather than working under a contract for services, she will continue to have the benefit of the current employee right to take time off for ante-natal appointments and will not therefore need to meet the 12 week qualifying criteria.

1.3 Issues for the agency

An agency will need to take care to ensure that it does not unreasonably prevent an agency worker from taking time off to attend her ante-natal appointment and that it pays her in accordance with the legislation for her time off. The agency worker will be able to seek a remedy against the client or hirer if either prevents her from exercising her right to take time off from an assignment (see Factsheet 5).

In practical terms an agency worker engaged under a contract for services is under no obligation to attend an assignment, and most agencies would be wise in any case not to prevent the agency worker from taking time off from an assignment. Such action can be evidence which would support a claim that the agency worker is in fact an employee of the agency. Clients would also do well to avoid preventing the agency worker from taking time off to avoid a similar risk that they could be deemed to be the employer.

Therefore, the major issue with this new right is likely to be agency worker's entitlement to be paid for the time off. This is a cost that the agency will not automatically be able to recover from the client and is also one which cannot necessarily be built into the charge rate in the same way as holiday pay for example.

An agency will fall foul of the new provisions if it seeks to avoid liability to pay an agency worker when she attends her appointment by rearranging the times that she would otherwise be asked to work on an assignment. In practice, most women are required to attend a limited number of ante-natal appointments and may receive long notice. It may be difficult to identify what an agency worker's "working time" will be in some cases.

Example 1

An agency worker in a long term office based assignment, whose hours over the assignment are typically 9am to 5pm, notifies her agency that she has an ante-natal appointment in the morning between those hours. If the agency advises that worker that in fact she is not needed that day, or that she can start later and make up the hours, this is likely to strongly suggest that arrangements have been made to avoid paying the agency worker as required.

Example 2

An agency worker in a long term assignment, in which she works any of the client's three shifts each day, is required to contact the agency to advise it of her availability each week and to receive notice of the shifts she will be working the following week. If the agency worker has previously notified the agency of her forthcoming ante-natal appointment in the following week, and she is allocated a shift which allows her to attend the appointment without having to take time off, it may be difficult to say that the agency has deliberately placed her in a shift to avoid paying her for taking time off.

2. The right to be offered alternative work – health and safety

The Regulations also make further amendments to current employment laws which will result in pregnant agency workers being entitled to be offered alternative work if an assignment becomes unsuitable because of the pregnancy.

In a situation where an agency worker's assignment is ended on health and safety grounds which arise because she is pregnant, breastfeeding or has recently given birth, the agency will be required to offer to put her forward for another suitable assignment.

2.1 What is a suitable assignment?

The alternative suitable assignment will have to be one which is free of the health and safety risks which caused the original assignment to be terminated and involve work which is appropriate for the agency worker to do in her circumstances. Additionally the terms and conditions which apply to the alternative role must be at least as favourable as those which applied to the terminated assignment. On the face of it this would suggest that the pay rate of the alternative assignment would need to be similar to the original role, but other terms would also need to be taken into account; working hours, location etc.

2.2 How long will an agency be required to continue to supply an agency worker in an alternative role?

This particular obligation will only apply for what was the intended duration of the terminated assignment. Of course, it will not always be the case that a client has provided a specific end date for an assignment, so where the particular end date is not known, the agency's obligation will continue for what would be the anticipated end date. This again may not be entirely clear and agencies will need to try to obtain as much information from the client as possible and possibly seek advice on a case by case basis.

2.3 Payment for the agency workers if no alternative role is available

In a case where an agency worker's assignment is ended on maternity related health and safety grounds, if the agency is not able to find an alternative assignment which meets the above criteria, the agency will be required to pay the agency worker for the duration of the terminated assignment. Again, as above if the end date of the assignment is not known, the agency will be required to pay the agency worker for what would have been the likely duration of the terminated assignment.

2.4 How much pay is agency worker entitled to?

The legislation says that the agency worker will be entitled to receive a week's pay for each week she is not able to work in the terminated assignment as above. The week's pay is referred to as the amount that the agency worker would receive under her contract with the agency if her original assignment would not have been ended on maternity grounds. Unfortunately no further information is provided about how this should be calculated if the hours available in the assignment are likely to fluctuate from week to week.

2.5 Are there circumstances in which the agency worker will not have to find alternative assignment or pay the agency worker?

If the agency worker gives written notice to the agency that she no longer wants the agency to continue providing work-finding services to her, the agency will no longer need to source alternative assignments.

Also if an agency offers to put the agency worker forward to a client for an alternative role and the client accepts the worker for the assignment, the agency will not be required to pay the agency worker if she turns the assignment down "unreasonably". There will be circumstances in which it may quite easily be argued that an agency worker has "unreasonably" rejected an alternative assignment, for example where the terms are identical with no great difference in location. In other cases this may be more difficult to determine. However if the agency has taken clear details from the agency worker at the registration stage as to the type of work she wishes it to find for her, the agency should have a good argument regarding suitability of roles if the work falls within the similar description and the terms are not substantially less favourable.

2.6 What other issues will agencies need to consider?

One of the key problems that an agency may face here is where it has identified a suitable alternative assignment and offered the agency worker to a client, who then declines to accept the agency worker. This does not allow the agency to avoid then having to pay the agency worker if no other suitable assignment can be found. Clients will need to take care though, not to discriminate against an agency worker by unlawfully refusing to accept her for an assignment.

The issue of being able to find suitable alternative assignments is likely to be greatly affected by the sector in which agencies operate. For example in sectors which supply agency workers into the type of work which does not inherently give rise to health and safety risks which would lead to termination of an assignment on maternity grounds, agencies should more easily be able to source alternative assignments. It may be that in these cases risks arise because of the nature of a client's site for example.

In other sectors, for example, agencies that supply radiographers, airline cabin crew, where risks are common for specific roles because of the nature of the work, sourcing alternative work which is suitable for the agency worker to do, will be more difficult.

There is nothing new being introduced by the Regulations about steps that agencies and clients need to take to identify health and safety risks which arise in connection with maternity. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 already require agencies to obtain health and safety information from clients and to withdraw an agency worker from an assignment when information is received which leads the agency to conclude that the agency worker is not suitable for the role.

The real issue to tackle here will be the duty to find alternative work in order to limit the cost of paying the agency worker while she is not in an assignment. In some respect agencies should be in a better position to do this than employers are when dealing with their own directly employed staffs who work purely in their undertaking. By contrast, agencies are in the business of finding work and should have a range of clients to which the agency worker can be supplied.

REC Legal

June 2010

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?