

Agency Worker Regulations

Factsheet 3 - How does an agency worker qualify for equal treatment?

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 3rd 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 will give agency workers new rights to receive treatment equal to that of a client's own directly engaged workers in respect of pay, conditions relating to working hours, access to client's on-site facilities and the right to be informed of job vacancies that the client has.

Agency workers will have a right to access client on-site facilities and to be informed of job vacancies applying from day 1 of an assignment. However the additional rights to equal pay and working conditions will only apply to agency workers who "qualify" by working for a "qualifying period." In this Factsheet we look at how an agency worker will establish the right to equal treatment and how the qualifying period is measured.

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1. How does an agency worker qualify for equal treatment?

The Regulations state that an agency worker is not entitled to equal treatment until she/he has completed the qualifying period. Under Regulation 7 an agency worker will complete the qualifying period by working "in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments."

On the face of it, counting 12 weeks may seem fairly straight forward but there are a number of factors that will in practice make the 12 week period difficult to measure.

1.1 12 weeks with the same Client

The first point to note is that the agency worker must complete the 12 week period by working with the same client and not simply by working for 12 weeks with the same agency. This means that an agency worker can complete the qualifying period even if she/he is supplied by more than one agency to the same client.

Agencies will therefore need to have mechanisms in place to identify those agency workers who may have already been supplied to a client. You can request this information from the client (see Factsheet 5) but ultimately the agency worker will be best placed to provide this information - we would suggest that this is something which should be addressed at the registration stage.

1.2 What is meant by the same role?

Regulation 7(3) states that the agency worker will be working in the same role unless she/he starts a new role in which the work or duties are "substantively different".

While in some cases it will no doubt be relatively straightforward to identify when the work that the agency worker is doing in a new assignment is "substantively different" there will be situations when this is not as easy to identify. However, the Regulations place the focus on the work and duties performed during the assignment, so if the only difference in a new assignment is that the agency worker moves to a different department, this will not be a new role. For example, if an agency worker is supplied to provide admin support (typing, filing, etc) within a client's sales team and moves to do the same work for the marketing department for the same client, the work and duties here are clearly the same and there is no new role.

Even if the work and duties are "substantively different", the agency worker will only be deemed to be in a new role if the agency notifies the agency worker in writing about the type of work which she/he will be doing in the new role. Presumably the purpose of this is to ensure that the worker is aware that the duties will be different and to flag up that this may delay or prevent her/him from reaching the 12 week qualifying period.

If the agency worker starts a new assignment, albeit carrying out the same work and duties as in a previous assignment, but with a different client, this will not be the "same role" for the purposes of the Regulations. In this case the agency worker will start a new qualifying clock for this new assignment. Much greater clarification is needed in this area to be clear about what is meant by "substantively different" and this is one of the areas that the REC will press the Government to address in its "Guidance to the Regulations".

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2. Breaks in assignments

2.1 Working for 12 continuous weeks

Any week in which the agency worker works for the hirer will count towards the 12 week qualifying period, even if she/he works for just 1 day in the week. There will be no need for an agency worker to work for 12 continuous weeks in order to reach the qualifying period. The Regulations allow the agency worker to have certain breaks in an assignment without having to start counting 12 weeks from scratch. This means that an agency worker's qualifying period can be accrued over a period of time which exceeds 12 weeks.

2.2 The 6 week break

Regulation 7 provides that if the agency worker takes a break from an assignment for any reason and the break is for 6 weeks or less, on returning to the same role, the weeks that the agency worker previously worked will be carried forward. So for example, if an agency worker works for 8 weeks in a role with a client and takes a 2 week break from the assignment for whatever reason, on returning to the same role with the same client, she/he will enter into the 9th week of the count towards 12 weeks. The agency worker will not have to start counting again from zero but will only need a further 4 weeks to reach the 12 week qualifying period.

2.3 Other breaks

An agency worker will also be able to carry forward weeks previously worked towards the qualifying period if they have a break in continuity which is caused by:

- sickness or injury (up to a maximum of 28 weeks and provided evidence is given to the agency where requested);
- pregnancy, childbirth or maternity and the agency worker is within a "protected period" (i.e. from the beginning of pregnancy to 26 weeks from childbirth);
- statutory/contractual maternity, adoption or paternity leave;
- jury service;
- periods when the client does not require the agency worker because of various types of industrial action at the client's establishment; or
- periods when the client does not require the agency worker because the business has temporarily closed down (e.g. Christmas shut down). This means that even if the break is for 6 weeks or more but is for one of the reasons listed above, any weeks worked prior to the break will be carried forward and added to any weeks worked subsequently.

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2.4 Weeks where the agency worker will be deemed to be working even when unable to continue working in a role. The provisions in 2.3 above apply to situations which arise when an agency worker takes a break and returns to the same role with the same client. The Regulations will also allow an agency worker to count weeks toward the qualifying period when she/he starts a role but then is unable to complete it. These circumstances are fairly limited and will only apply if the reason that the agency worker has not returned to the assignment is related to pregnancy, childbirth or maternity and/or due to statutory or contractual maternity, paternity or adoption leave. The agency worker will be deemed to have worked in any week which is covered by the above reasons for either the actual duration of the assignment or the likely duration of the assignment.

3. Achieving the qualifying weeks while working for different agencies - what issues will this raise for recruiters?

As can be seen, the 12 week qualifying period can actually be achieved over a longer period of time if the agency worker's assignment or assignments are broken by certain circumstances.

When registering and supplying a new agency worker, it will be crucial for the agency to have procedures in place to identify whether the agency has already worked for the same client in the same role even if this is through a different agency. The worker may have already worked some weeks towards the qualifying period or may even have completed the full 12 weeks meaning that she/he is immediately entitled to equal pay and working conditions. Where this is the case, it is important that the agency takes steps to ensure that the working terms and employment terms applied are compliant with the Regulations.

3.1 Is the client or agency worker best placed to provide information?

Agencies can request this information from the agency worker at the registration stage as she/he will ultimately be best placed to confirm whether or not she/he has previously worked for the same client. Agencies should also at the same time as proposing a worker to the client, request information from the client as to whether the worker has previously undertaken any role with them via another agency, and if so what the role was and what the earliest date is that the worker worked for the client (see Factsheet 5 for further information).

3.2 Tracking entitlement

There may be significant problems in tracking and monitoring agency workers to identify at what stage the qualifying period is reached, particularly in those sectors where agency workers are engaged by multiple agencies. However clients who presently are keen to avoid paying temp-to-temp transfer fees may already have mechanisms in place to identify workers who have previously worked for them through another agency. In this case it may not be too difficult for them to provide agencies with information which will assist in ensuring that the Regulations are complied with. Agencies must ensure that they have sought relevant information from the client in order to avoid liability under the Regulations (see Factsheet 5 for further information).

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3.3 Will agency workers be able to count time worked in an assignment before the Regulations come into effect to qualify for equal treatment?

No. The Regulations will not be retrospective. This means that any time spent on an assignment before 1st October 2011 will not count towards the qualifying period.

3.4 Can agencies or clients manage assignments to prevent agency workers from reaching the 12 week qualifying period?

To do so would incur a significant risk to both agency and client. In anticipation of the possibility that assignment might be structured in such a way to prevent agency worker from ever reaching the qualifying period, the Regulations include anti-avoidance measures. (See Factsheet 5 for further information).

3.5 Examples of how to calculate the qualifying period:

Example 1

A starts a new assignment on 1st October 2011. From that date A is entitled to use any staff canteen, childcare or transport facilities. A works continuously for 12 weeks in that assignment. From week 13, A is also entitled to receive equal treatment in terms of pay and working conditions in comparison to the client's own directly engaged staff.

Example 2

C starts a new assignment on 2nd January 2012. From day 1 C is entitled to access client on-site facilities such as the staff canteen, childcare or transport facilities. C works continuously for 5 weeks, and then takes a 4 week holiday. This does not stop the qualifying clock and the 5 weeks worked to date are carried forward. C returns to the same assignment, and works for another 5 weeks before the assignment is terminated by the client. C now has ten weeks on the qualifying clock. After 7 weeks the client requests that C returns to do the same job. This 7 week break exceeds the 6 week break permitted by the Regulations and stops the qualifying clock, so in the new assignment C will start from zero in working towards the 12 week qualifying period.

Example 3

D starts work for the client on 1st August 2011. From day 1 D is entitled to access client on-site facilities such as staff canteen, childcare or transport facilities. D works continuously for 12 weeks. However the period up to and including 30th September 2011 does not count towards the qualifying period as this date falls before the Regulations come into force (1st October 2011). Only those weeks worked from 1st October 2011 will count towards the qualifying period.