

Agency Worker Regulations

Factsheet 4 - What is 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 4th 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 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

As set out in Factsheets 1 and 3, agency workers will be entitled to new rights to receive treatment equal to that of workers who are directly engaged by a client. The Regulations limit this equal treatment to "pay" and certain "working conditions". The Regulations will also entitle agency workers to have access to certain on-site facilities which are provided by a client and also to receive information from a client about permanent jobs which the client has available.

In this Factsheet, we explain what is meant by "pay" and "working conditions" and also the facilities that clients will need to make available to agency workers.

1. Qualifying for equal treatment

As set out in Factsheet 3, agency workers will need to qualify in order to be entitled to receive equal pay and working conditions. It is important to note that the qualifying criteria (working for 12 weeks for the same client in the same role) do not apply to the right to access a client's collective facilities or information about permanent roles which will apply from day 1 of an agency worker's assignment.

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2. What is equal treatment?

Regulation 5 provides that a qualifying agency worker is entitled to the "same basic working and employment conditions as [she/he] would be entitled to for doing the same job had [she/he] been recruited by the hirer...". Regulation 6 then sets out what these basic working and employment conditions are.

They are:

- pay;
- the duration of working time;
- night work;
- rest periods;
- rest breaks; and
- annual leave.

2.1 What is equal pay?

"Pay" is defined as "sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emoluments referable to the employment, whether payable under the contract or otherwise".

Certain payments have been excluded. These include payments which are not "directly attributable to the amount or quality of the work done" by the worker but rather, are designed to "reward the worker's long term service". See section 2.1.2 for further detail.

At their most simple the Regulations will mean that if a client pays a directly employed worker £8.00 per hour to work on a production line, a qualifying agency worker supplied to do exactly the same role will also be entitled to be paid at least £8.00 per hour. The agency worker can look either to the actual pay that the client's own directly engaged worker receives, or the amount that the client would pay someone doing an identical role if the client has no specific comparator.

2.1.1 Specific elements included in pay

However, pay does not simply take into account the basic hourly rate that an agency worker receives. The specific inclusion of bonuses and holiday pay has in particular given rise to concerns for agencies in terms of how exactly equal pay can be measured.

• Bonuses

Unfortunately there is no standard type of bonus and this will mean that agencies will need to carefully consider which bonuses to include and which to exclude for the purpose of equal pay. Clients who pay bonuses to their own directly engaged workers may have different criteria, rules and formulae for such payments. A bonus that a client pays which is directly attributable to a worker's individual performance will be within the definition of "pay". In comparison, a bonus which is directly linked to an individual's length of service, will not be within the definition of "pay".

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These are fairly simple examples, but the reality is that clients often have more complex bonus schemes which might include for example, a formula which combines the performance of the business with performance of

individual departments as well as individual workers. Additionally, where individual performance does have bearing on a bonus payment, clients may have appraisal systems in place to assess to what extent individual targets have been reached. Quite sensibly, clients will not wish to include agency workers in appraisal procedures as this may be a factor which supports a contention that an agency worker is in fact the client's own employee. Agencies themselves will not find it easy to carry out such appraisals as the agency worker would have to be assessed against the client's own criteria.

Example 1

A client's directly engaged worker in a call centre receives a bonus for dealing with X number of calls within a shift. In accordance with Regulations 5 and 6, a qualifying agency worker who meets those same targets would also be entitled to receive the bonus as this is a sum "payable to a worker of the hirer in connection with the worker's employment".

Example 2

A client assesses at the end of each financial year how well the business has performed. If certain criteria are met, the client makes a bonus payment to individuals under a formula which for example, pays either a percentage of that individual's salary, or relates to the length of service she/he has with the client – the longer the service, the higher the bonus. In this case a qualifying agency worker would not be entitled to receive a payment that reflects this bonus as such bonus is excluded because it is not "directly attributable to the amount or quality of the work done" by the worker but rather, are designed to "reward the worker's long term service".

- **Holiday pay**

A qualifying agency worker will be entitled to parity in terms of holiday pay. This means that where a client provides holiday entitlement which is more generous than the statutory minimum allowance, a qualifying agency worker will be entitled to the same.

- **Vouchers and stamps**

The definition of "pay" in the Regulations also extends to vouchers or stamps that a client gives to its directly engaged workers, if there is a monetary value attached to the stamps and they can be exchanged for goods or services. This could include for example luncheon vouchers.

Clearly, agencies will need to ensure that they seek detailed information regarding pay (including bonuses) from clients in good time to ensure that equal treatment can be applied once the qualifying criteria is met (see Factsheet 3).

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2.1.2 Payments excluded from the definition of pay

A number of different types of payments have been excluded from the definition of pay and which an agency worker will not therefore be entitled to receive. These include:

- occupational sick pay (i.e. sick pay over and above statutory sick pay)
- a pension, allowance or gratuity in relation to retirement or compensation for loss of office;
- any payment in respect of maternity, paternity or adoption leave; 1
- redundancy pay;
- any payment in relation to a "financial participation scheme" i.e. a distribution of shares or options, or a share of profits in cash or shares;
- payments that a client pays to its own directly engaged workers which are not "directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long term service";
- expenses;
- other prescribed payments.

Importantly, agency workers who have a permanent contract of employment with the agency, will not be entitled to equal pay provided that certain conditions set out in the Regulations are met. (See Factsheet 7 for further details.) Temporary workers who meet the relevant qualifying criteria are entitled to statutory maternity, adoption or paternity pay.

2.2 Working Time

All qualifying agency workers will be entitled to equal treatment with regards to working time, including the duration of their working hours, night work, rest periods and breaks. (See Factsheet 7 for further details.)

2.3 Annual leave

Qualifying agency workers will be entitled to the same annual leave as workers directly engaged by the client. The REC argued that this entitlement should be restricted to the statutory entitlement (at the time of writing 28 days including public holidays). However the Government believes that in order to comply with the Directive, agency workers must be entitled to the same annual leave workers directly engaged by the client are entitled to. The suggestion is that agency workers will be entitled to payment for any annual leave entitlement over and above the statutory entitlement, but we await BIS guidance for further details on this.

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2.4 Access to collective facilities

2.4.1 What facilities?

Agency workers will also be entitled to access facilities which clients make available to their own workers on-site, such as canteen, childcare facilities and transport services. There is no qualifying period for this right so agency workers are entitled to this from day 1 of an assignment.

2.4.2 Will a client always be required to provide equal access to facilities?

Importantly, unlike the right to equal treatment in terms of pay and working conditions, there are circumstances in which a client will be able to argue it is not obliged to make the same provisions to agency workers as it does to its directly engaged workers. The Regulations will enable a client to withhold access to such facilities if this less favourable treatment can be objectively justified. Unfortunately, there are no examples given in the Regulations as to when less favourable treatment can be objectively justified. Clearly cost may be an issue but it remains to be seen whether cost alone will be deemed to be an objective justification for withholding access to these facilities.

2.5 Access to information regarding vacancies

Agency workers will be entitled to be provided with the same information as the client's own directly engaged workers about any jobs which the client is seeking to fill. Again, there is no qualifying period for this right so agency workers are entitled to this from day 1 of an assignment. This does not mean that an agency worker had a right to be employed by the client.

Conclusion

Agencies and their clients need to distinguish between those rights to which an agency worker is entitled from day 1 of an assignment and those to which she/he is entitled only on completion of the 12 week qualifying period. Agencies will also need to be aware of the client's pay structures so that they can correctly calculate what is equal pay.