

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

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 5th 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

There will be no specific independent body which will be responsible for policing the Regulations. If an agency worker considers that she/he has not received equal treatment she/he can take an action against the agency, the client or both in an employment tribunal. Importantly, the Regulations say that the agency is only liable so far as it is responsible for the agency worker not receiving equal pay.

Clearly an agency can only rely on the information received from the client, and helpfully, the Regulations provide agencies with a defence i.e. if the agency requests the appropriate information from the client and relies on the information received (by paying the agency worker and giving him/her certain working conditions as advised by the client), then it will not be liable for the breach. The Regulations then shift the liability to the client.

Therefore it is important that agencies ask their clients the right questions at the right time. This Factsheet sets out those questions. It also looks at the remedies available to agency workers in the event of breaches of the Regulations.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

1. What questions should an agency ask its client to make sure it complies with the regulations?

1.1 The agency's obligations

In order to ensure that an agency worker receives equal treatment, the agency must request the appropriate information from the client. The Regulations do not give a prescriptive list of information to be sought, but agencies should ask for enough information to establish what basic working and employment conditions a comparable employee of the client would receive if in the same role. The relevant questions are:

- is there a comparable employee or worker? If yes, what terms is that comparable worker or employee engaged under?
- if there is no comparable employee or worker, then what terms would the client have engaged the agency worker on if they were to engage them directly?

In particular agencies need to know the following:

- Pay (see Factsheet 4)
 - what are the hourly rates payable to a comparable employee or worker? Alternatively, if a salary is paid, what hourly rate does that equate to?
 - is commission paid? If yes, how is this calculated?
 - what bonuses are payable, on what basis and when?
 - what rates are paid for unsociable hours?
- Hours of work
 - what are the anticipated hours of work?
 - what rest breaks does the client give to other workers?
- Annual leave
 - what contractual holiday is the comparable employee or worker entitled to – is it equal to or greater than the statutory minimum?
- Previous time working for the client
 - has the worker worked in the same role at that client previously, even through another agency? This is important because she/he may have already accrued some time towards the qualifying period (see Factsheet 3).

The agency should obtain the necessary information in sufficient time to allow it to comply with its obligations under the Regulations. We would recommend therefore obtaining the information from the client either prior to the commencement of the assignment, or as soon as the agency knows the assignment will last more than 12 weeks.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

1.2 Helping clients meet their obligations under the Regulations

The client will be liable for any failure to give access to collective facilities and amenities or to information on employment opportunities. An agency worker is entitled to these from day 1 of their assignment (see Factsheet 3). Whilst the agency has no liability for these rights, agencies can help their clients to meet their obligations by asking the following questions on receipt of instructions to supply an agency worker:

- Collective facilities
 - what collective facilities are available to the client's own workers? These include, for example, canteens, child care facilities and transport services.
 - can the client justify on objective grounds withholding access to these collective facilities from agency workers?
- How does the client advertise any vacancies which arise?

Example 1

The agency knows at the outset that an assignment will last for 12 weeks. In this case it may be worth obtaining the above information when receiving detailed instructions from the client at the outset.

Example 2

The agency initially thinks that the assignment will last just a few weeks, but in fact it is extended on more than one occasion. As soon as there is a possibility that the assignment will extend beyond 12 weeks, the agency should request this information from the client.

2. What can an agency worker do if she/he thinks she is not receiving equal treatment?

2.1 Written information requests

If an agency worker considers that she/he has not received equal treatment she/he may make a written request to the agency for a written statement containing information relating to that treatment. The agency then has 28 days to respond to the agency worker. There are two possible consequences if the agency does not respond to the agency worker within this period:

- the agency worker can make an information request direct to the client – which may cause reputational damage to the agency; and
- if an agency worker makes a claim to an employment tribunal, and it finds that the agency deliberately and without good reason failed to provide the information requested, or that any written statement given in response to an information request is evasive or equivocal, then the employment tribunal can draw an inference that the agency worker's rights have been infringed.

The agency's written statement should contain the following:

- relevant information relating to the basic working and employment conditions of the workers of the hirer;

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

- the factors the agency considered when determining the basic working and employment conditions which applied to the agency worker at the time she/he allegedly did not receive the equal treatment they claim they were entitled to receive;
- relevant information which explains the basis on which the client's comparable employee was identified and the relevant terms and conditions applicable to that employee.

If the agency worker does not receive the written statement from the agency within 30 days of making the request, the agency worker can make the same request to the client. The client then has a further 28 days to respond to the request.

2.2 Who is liable?

2.2.1 The agency's liability

The Regulations set out the procedures that an agency worker can follow if she/he wishes to make a claim for breach of the Regulations. An agency worker who alleges that she/he has not received equal treatment can bring a claim in the employment tribunal against either the agency, the client or both. She/he must do so within 3 months of the alleged failure (unless the tribunal agrees to extend the time limit).

The agency will bear primary liability for any alleged failure to provide equal treatment in terms of pay and basic working and employment conditions but, will have a statutory defence if it:

- (a) requested the appropriate information from the client;
- (b) relied on the information provided in its dealings with the agency worker; and
- (c) ensured that where it was responsible for applying those basic working and employment conditions to the agency worker, that it did so.

If an agency receives an employment tribunal claim from an agency worker claiming that it did not provide him/her with equal treatment, the agency should promptly seek legal advice. If the client bears some responsibility for the alleged breach it may be appropriate to join them as a co-respondent to the claim (though of course this is as much a commercial as a legal decision). If an employment tribunal finds that the agency worker did not receive equal treatment, then it will apportion any compensation awarded to the agency worker between the agency and the client depending on where it decides the fault lies.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

2.2.2 Liability of other links in the supply chain

It is increasingly common for recruitment businesses to supply agency workers to clients via intermediaries, including master or neutral vendors¹ or umbrella companies. Regulation 2 provides that such intermediaries are “temporary work agencies” for the purposes of the Regulations. Where more than 1 “temporary work agency” is a party to the proceedings, an employment tribunal shall consider the extent to which each agency is responsible for the alleged breaches. Therefore if an agency acts:

- as a second tier supplier, it needs to be able to request the necessary information whether from the master/neutral vendor or directly from the client and with sufficient time to act on that information;
- as a master or neutral vendor, it should ensure that the second tier suppliers have access to the necessary information. The master or neutral vendor should request the relevant information from the client and ensure it is passed to the second tier suppliers promptly (either at the time of the booking request, or when the assignment is approaching the 12 week mark, but certainly before the assignment has moved into the 13th week) or permit the second tier suppliers to request this information directly from the client (though we recognise neither clients nor master/neutral vendors are likely to wish second tier suppliers to contact the client directly).

2.3 Employed agency workers and breaches of Regulations 10 and 11

Factsheet 7 explains that agency workers who are employed by the agency shall not be entitled to equal pay, provided certain conditions set out in the Regulations 10 and 11 are met. Liability for breach of Regulations 10 and 11 will rest solely with the agency.

2.4 Penalties

If an employment tribunal finds that a client, agency or any of the intermediaries which meet the definition of a temporary work agency have failed to meet their obligations under the Regulations, it can do the following:

- (a) make a declaration as to the agency worker’s rights in relation to the claim made;
- (b) order the liable party to pay compensation to the agency worker;
- (c) recommend that the liable party take appropriate action within a given period to rectify the matter complained of.

2.5 Failure to give access to collective facilities and notice of vacancies

As set out at 1.2, the client is wholly liable for any failure to provide access to collective on-site facilities or for not providing access to information on vacancies.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

2.6 Compensation for breach of the Regulations

As mentioned above, the employment tribunal can award compensation to an agency worker where they have suffered a breach under the Regulations. Such compensation will normally be based on their losses based on their week's pay. The award will normally be at least 2 weeks' pay, calculated in accordance with Regulation 19 (see section 2.6.1), however there is no cap on the award which can be made.

The tribunal can reduce a compensatory award if it finds that the agency worker contributed to their own loss. There is no award for injury to feelings.

2.6.1 Pay

For the purposes of compensation, a week's pay shall be the higher of (i) the average weekly pay actually received by the agency worker, or (ii) the average weekly pay she/he should have received, in the relevant period in relation to the assignment to which the claim relates. Only basic pay is taken into account.

Overtime, shift premia or bonuses will not be taken into account.

2.6.2 The relevant period

The relevant period will depend on whether the assignment has or has not ended at the date the claim is made to the employment tribunal:

- if the assignment ended on or before the claim is made in the tribunal, the relevant period is the 4 week period ending with the last day of the assignment to which the claim relates.
- if the assignment has not ended, the relevant period is the 4 week period immediately preceding the date of the claim.

In either case if the assignment was less than 4 weeks, the duration of the assignment will be the relevant period.

3. The right not to be unfairly dismissed and not to be subjected to detriment

3.1 The Regulation 17 rights

Regulation 17 provides that an agency worker who is employed by the agency (see Factsheet 7) shall automatically be deemed to be unfairly dismissed if any of the circumstances set out below apply to their dismissal (i.e. she/he does not need the 1 year's service ordinarily required to bring an unfair dismissal claim).

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

An agency worker will also have the right not to be subjected to a detriment (e.g. refused any more work, given work at a lower rate of pay or given more unsociable hours) because she/he has done any of the following:

- (a) the agency worker brings proceedings under the Regulations;
- (b) she/he gives evidence or information in connection with proceedings under the Regulations brought by another agency worker;
- (c) she/he requests a written statement on the treatment she/he received or should have received;
- (d) alleges that an agency or client breached the Regulations;
- (e) refuses to give up any of their rights under the Regulations; or
- (f) either the agency or the client suspected or believed that the agency worker has done or would do any of the above.

3.2 Penalties for breach of Regulation 17

3.2.1 Unfair dismissal

An agency worker who is an employee can bring a claim for unfair dismissal.

3.2.2 Penalties for subjecting an agency worker to a detriment

If a tribunal finds that an agency (whether the supplying agency or an intermediary), the client, or a combination of these persons did subject an agency worker to a detriment the tribunal can award at least 2 weeks' pay. This will be calculated as set out at 2.6.1 above. Again the tribunal can reduce the agency worker's compensation if it finds that she/he contributed to their own loss. There is no award for injury to feelings.

3.3 Maternity related rights for agency workers

Factsheet 6 sets out new pregnancy related rights for agency workers under the Regulations. In brief, agency workers will be entitled to:

- Paid time off to attend ante-natal appointments;
- be given suitable alternative work where her assignment has ended on pregnancy related health and safety grounds and be paid where no suitable alternative work is available.

An agency worker may bring a claim in the employment tribunal if she is unreasonably refused the time off to attend her ante-natal appointment. She must do so within 3 months of the appointment concerned (unless the tribunal permits her to bring a late claim). If her claim is upheld, the tribunal will order payment of the monies she would have been entitled to had she not been refused the time off. Again, the tribunal can apportion the compensation between the agency and the client depending on where the fault lies.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

An agency worker may also bring a claim in the employment tribunal if she is not paid when she is not working because no suitable alternative work was found for her. She must bring the claim within 3 months of the day on which her assignment with the client was terminated, (unless the tribunal permits her to bring a late claim). If her claim is upheld, the tribunal will order compensation to cover her losses. In this instance the liability remains with the agency.

The agency will have to bear these new rights in mind when costing assignments. However care must be taken at all times not to discriminate against a pregnant agency worker by not putting her forward for roles because of the agency's potential liabilities under the Regulations. This could give rise to a claim for sex discrimination.

4. Anti-avoidance measures

The Regulations contain anti-avoidance measures to prevent agencies and/or their clients structuring assignments in such a way as to prevent an agency worker from reaching the 12 week qualifying period required for equal pay and working conditions. These measures are set out in Regulation 9 which provides that an agency worker will be deemed to have completed the qualifying period in the following circumstances:

- she/he has completed 2 or more assignments with a client;
 - she/he has completed at least 1 assignment with the client and 1 or more earlier assignments with persons connected to the client; or
 - she/he has worked in more than 2 roles during an assignment with the client and on at least 2 other occasions has worked in a role that was not the "same role" as the previous role; and
 - the most likely explanation for the structure of the assignment or assignments is that the client or persons connected to the client intended to prevent the agency worker from qualifying for equal treatment.
- If an agency worker makes a complaint that his/her assignments have been structured in such a way as to prevent him/her from qualifying for equal treatment, the tribunal will look at the following in particular:
- the length of the assignments;
 - the number of assignments with the client and persons connected to the client;
 - the number of "new" roles the agency worker had with the client and, where applicable, persons connected to the client;
 - the number of times the agency worker returned to the same role with the client and, where applicable, persons connected to the client; and
 - the break periods between the various assignments.

If a tribunal finds that the assignments were structured so as to prevent the agency worker from reaching the 12 week qualifying period, then the tribunal can award up to £5,000 divided between the agency, the client and any intermediaries which are "temporary work agencies", where the tribunal finds that more than 1 person is responsible.

Agency Worker Regulations

Factsheet 5 – Liability for breach of the Regulations

5. Liability of agencies for their employees

Agencies will be liable for the actions of their own employees which result in an agency worker's rights being infringed, although an agency will have a defence if it has taken steps to prevent any wrongdoing by its employees. Therefore, agencies and clients alike should ensure that their own employees understand the Regulations, understand the rights they give to agency workers and do not behave in such a way as to prevent an agency worker receiving his/her entitlement.