

Factsheet 2 - Exclusions for limited company contractors and self-employed workers

The Agency Workers Regulations 2010

The Agency Workers Regulations will come into force in England, Scotland and Wales on 1 October 2011. In Northern Ireland the Agency Workers (Northern Ireland) Regulations 2011 will come into effect on 1 December 2011.

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 second 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 take into account 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 Agency Workers Directive 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. What do the Regulations say about limited company contractors?

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. Unfortunately Regulation 3 which defines who is an agency worker provides no specific exclusion for limited company contractors.

The question of whether a limited company contractor is or is not covered by the Regulations will depend on whether or not the individual meets the definition of an agency worker. Any person who carries on business of their own account, through a limited company or otherwise and who does not work under the hirer's supervision and direction is not covered by the Regulations.

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 she/he 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 or her own account or not.

Most professional contractors will of course be familiar with the self employment 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. they would be 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.

3. Who is genuinely self-employed or not?

The BIS guidance which is expected in April 2011 will set out in greater detail the points the agency should consider to decide whether someone is genuinely self-employed or not. However the common factors which have been considered to determine employment status include:

- 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 client 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.

4. What about limited company contractors who work through an intermediary which is not their own corporate vehicle?

Workers who are supplied via umbrella companies or other intermediaries are not prevented from being agency workers for the purpose of the Regulations. Where the arrangement for the supply of such individuals still involves a temporary work agency and the individuals are supplied to work under a hirer's supervision and direction, the Regulations will still apply.

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 have confirmed that the overall policy intention is to limit the impact for those who are genuinely self-employed. The REC will push for more clarity on this whole area to be included in the BIS Guidance document due in April 2011.

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?

The Department of Business, Innovation and Skills (BIS) is currently working on guidance to assist clients and agencies to implement the Regulations correctly. The REC is working closely with BIS on this guidance which should be released in April 2011. The Department of Employment and Learning (DELNI) are currently consulting on the NI Regulations (these are almost identical to the UK Regulations) and will produce separate guidance later this year.

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