



Escape Recruitment

AWR

Agency Worker Regulations

Hirer Information Pack

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Contents

Contents:

Overview	3
Key Information and Definitions	4
The 12 week qualifying period	6
Entitlements	7
Anti- Avoidance Measures	11
Establishing Equal Treatment	12
Liability	13
Escape and the AWR	15
Additional Information and Useful links	16

Overview

What is the aim of this document?

This document has been produced by Escape Recruitment Services as a summary of some of the key points in the Agency Worker Regulations to help Hirers understand and prepare for the introduction of these regulations in October 2011.

This document has been created for your information only. It is not a substitute for legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

What are the Agency Worker Regulations?

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

In summary, once these Regulations come into force, they will give agency workers rights to equal treatment with regard to pay, holidays and working conditions as if they had been recruited directly, if and when they complete a qualifying period of 12 weeks in the same job, with the same Hirer.

Agency workers will also be entitled to access on-site facilities that an end user client provides to its direct workers and to be advised by Hirers of vacancies which arise in the Hirers business.

The right to equality does not apply to all terms and conditions of employment.

What is the aim of these Regulations?

The Regulations aim is to extend existing EU Regulations already in place to support equal treatment for part-time and fixed-term workers.

How can you prepare for the Regulations?

Temporary workers form a significant and important part of the UK workforce and it is important that all employers working with temporary workers:

- Learn** Ensure all relevant parties within your business understand the Regulations. This could include, amongst others: HR, Direct Hiring Managers and Finance
- Assess** Conduct an assessment within your business to understand the impact the Regulations may have on your business.
- Communicate** Work with your Recruitment Partners to ensure both parties have the correct information and you understand how you will share information going forward
- Plan** Ensure your business can meet your responsibilities, minimising risk and managing costs and administration effectively.

Key Information and Definitions

Who do the Agency Worker Regulations apply to?

- The Temporary Agency Worker
- The Temporary Work Agency (private, public and third party)
- The Hirer (private, public and third party)

Who is an Agency Worker?

For the purposes of the legislation a Temporary Agency Worker is:

- An individual who is supplied by a Temporary Work Agency to work temporarily for and under the supervision and direction of a Hirer, and
- Has a contract with the Temporary Work Agency which is either a contract of employment or some other contract to perform work/services for the agency.

What is a Temporary Work Agency?

It is important to note that the Agency Worker Directive (on which the regulations are based) differs in its definition of the word “agency” to that which recruiters and Hirers in the UK are used to. The definition in the Regulations more accurately matches the definition of an “employment business” in the Employment Agencies Act 1973.

For the purposes of the Regulations a Temporary Work Agency is:

An undertaking (most likely a company) which is in the business of:

- Supplying individuals to work temporarily for and under the supervision & direction of Hirers or
- Paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of Hirers.

Who is a Hirer?

This is the end user client ie the “person” (eg company, partnership, sole trader, public body) engaged in economic activity, public or private, whether or not for profit, which books agency workers to work temporarily for and under their supervision and direction.

“A Hirer will have its own legal identity – so a division within a company will not be a separate Hirer if it does not have its own legal identity”

Department for Business Innovation and Skills,
Agency Worker Regulations Guidance May 2011

What about a Self-Employed person?

Genuinely self-employed persons are excluded whether they operate via limited companies or not. Limited Company Contractors are agency workers if they are not genuinely self-employed. Further information on Employment Status can be found at www.direct.gov.uk or in REC Factsheet 2 which is available on our AWR resource page at www.go-escape.com

What about Intermediaries?

As the definition of a Temporary Work Agency in the Regulations includes undertakings “Paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of Hirers” umbrella companies and payroll providers solely handling payments for agency workers will also fall within the definition of a Temporary Work Agency.

What about Master and Neutral Vendors?

The definition of Temporary Work Agency in the Regulations includes master and neutral vendors involved in supplying agency workers, although they do not contract directly with the agency workers.

“Master or Neutral vendors fall within the legal definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals.”

**Department for Business Innovation and Skills,
Agency Worker Regulations Guidance May 2011**

When does the AWR come into effect?

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

It is important to note that the qualifying period is not retrospective.

Therefore for those Temporary Agency Workers currently on assignment, the 12 week qualifying period will start from 1 October 2011.

The 12 week qualifying period

What is the 12 week qualifying period?

In order to become entitled to have the same basic terms and conditions of employment as if they had been employed directly by the Hirer, a Temporary Agency Worker must complete 12 continuous calendar weeks during one or more assignments in the same role, with the same Hirer.

Note:

- Temporary Agency Workers also have rights under the Regulations which have no qualifying period. These are discussed in the "Entitlements" section of this document.
- The assignment(s) do not need to be with the same agency.
- The qualifying period is not retrospective.
 - o Therefore for those Temporary Agency Workers currently on assignment, the 12 week qualifying period will start from 1 October 2011.

How do you calculate the 12 week qualifying period?

Any week during which the agency worker works is counted whether full time or part time. A calendar week will comprise any period of seven days starting with the first day of an assignment.

Example: If an agency worker starts their assignment on a Wednesday, all work undertaken up to and including the following Tuesday will be counted as one calendar week.

Breaks within the 12 week qualifying period

There are three types of breaks:

- Breaks which stop the 'Qualifying Clock'
- Breaks which pause the 'Qualifying Clock'
- Breaks where the 'Qualifying Clock' continues

Breaks which pause the 'Qualifying Clock'

Breaks in work during or between assignments which pause the 'Qualifying Clock' will result in the time before and after the break(s) being aggregated. These are:

- A break in the assignment for any reason, if not more than 6 calendar weeks
- A break of up to 28 weeks because the agency worker is incapable of work because of sickness or injury
- Any break which is for the purpose of taking leave to which the agency worker is entitled, including annual leave
- A break caused by a regular & planned shutdown of the workplace by the Hirer (eg Christmas)
- A break of up to 28 calendar weeks to allow the agency worker to perform jury service.
- A break caused by a strike, lock-out or other industrial action at the Hirer's establishment.

Breaks which stop the 'Qualifying Clock'

Breaks which stop the 'Qualifying Clock' will result in the clock being reset to zero. These are:

- Where a Temporary Agency Worker begins a new assignment with a new Hirer
- Where a Temporary Agency Worker remains with the same Hirer but is in a different role.
- Where there is a break between assignments with the same Hirer which is longer than 6 weeks and does not meet the criteria of a break which 'pauses' the clock or during which the clock continues.

Breaks where the 'Qualifying Clock' continues

These breaks will allow the clock to continue for whichever is longer between:

- The original intended duration of the assignment,
or
- The likely duration of the assignment

These breaks are:

- Breaks due to pregnancy, childbirth or maternity which take place during pregnancy and up to 26 weeks after childbirth (or whenever she returns to work if this is sooner than 26 weeks)
- Any breaks due to the worker taking maternity leave, adoption leave or paternity leave

Entitlements

Entitlement Overview

Under the Regulations, Temporary Agency Workers will receive entitlements at two points in their assignment:

- On 'Day 1' of their assignment
- After completion of 12 week qualifying period.

What are the 'Day 1' rights for all agency workers?

From 'Day 1' of an assignment, Temporary Agency Workers are entitled to be:

- Treated no less favourably than a comparable worker or employee in relation to access to collective facilities and amenities provided by the Hirer
- Informed by the Hirer about any relevant job vacancies with the Hirer that would be available to a comparable employee or worker

'Day 1' Right - Collective facilities and amenities (Regulation 12)

Details on access to facilities is most likely already included in the Hirer's company handbooks and induction process. Therefore, to ensure you meet the regulation requirements the Hirer could either:

- Provide Temporary Agency Workers with information about their facilities as part of an induction pack
or
- Provide information to temporary work agencies to pass to agency workers as part of the information about the assignment.

This list is not exhaustive and may include:

- A canteen or other similar facilities
- A workplace crèche
- Transport services
- Toilets/shower facilities
- Staff common room
- Waiting room
- Mother and baby room
- Prayer room
- Food and drinks machines
- Car parking

The regulations do not mean that Temporary Agency Workers will be given any 'enhanced' access rights.

Example: where employees must join a waiting list to gain access to a crèche, the agency worker will be entitled to join the waiting list and would not have automatic rights to a place in the crèche.

'Day 1' Right - Information on Job Vacancies (Regulation 13)

The Hirer can choose how to publicise job opportunities. Hirers do not need to make individual communications with Temporary Agency Workers regarding opportunities. However to make certain Hirers meet the Regulation requirements, all agency workers should know where and how to access this information. Examples given in the regulations include:

- Internet/intranet or notice board in common area

Regulation 13 states that there is no obligation on the Hirer to employ the agency worker. There are no constraints placed on the Hirer regarding:

- Any qualification or experience requirements such as time in service with the organisation
- How Hirers treat applications

A genuine 'headcount freeze' where posts are "ring fenced for redeployment purposes" or internal moves where restructuring and redeployment of existing staff is taking place in order to prevent redundancy are excluded.

This right is limited to where there is a comparable employee or worker currently based at the same establishment.

What are Agency Workers rights after the 12 week qualifying period? (Regulation 6)

After the completion of the 12 week qualifying period in the same role with the same Hirer, Temporary Agency Workers will be entitled to “the same basic terms and conditions of employment as if they had been employed directly by the Hirer” at the time the qualifying period commenced.

Relevant terms and conditions that the agency worker is entitled to receive are those relating to:

- Pay
- Duration of working time
- Night work
- Rest periods
- Rest breaks
- Annual leave
- Pregnant agency workers who have completed the qualifying period are also entitled to:
 - o Paid time off for ante natal appointments and classes when on assignment
 - o Provisions where working environment poses risk to agency worker who is pregnant, has given birth in the last 6 months or is breast feeding a child.

What is meant by ‘Pay’ in the Regulations?

For the purposes of the Regulations, Pay means any sums of money paid to the Temporary Agency Worker in connection with the worker’s employment.

‘Pay’ Includes:

- Basic pay (based on annual salary a Temporary Agency Worker would have received if hired directly)
- Overtime payments (these are subject to any requirements relating to any qualifying hours)
- Shift or unsocial hours allowance, risk payments for hazardous duties
- Payment for annual leave (any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate)
- Bonus or commission payments which are directly attributable to the quality or amount of work completed by the individual.
 - o These can include non-contractual bonus payments if they have been paid with such regularity that they are established as a matter of custom or practice
- Vouchers or stamps which hold a monetary value eg child-care vouchers

‘Pay’ Excludes:

- Expenses eg accommodation or travel expenses
- Occupational sick pay
- Occupational pension schemes
- Occupational maternity, paternity or adoption pay
- Redundancy pay
- Notice pay
- Guarantee payments as they apply to directly recruited staff if laid off
- Payment for time off for Trade Union duties
- Advances in pay or loans
- Payment or reward linked to financial participation scheme eg share ownership schemes, profit sharing schemes, option schemes
- Overtime or similar payments where the agency worker has not fulfilled the qualifying conditions required of someone directly recruited
- Payments where the agency worker has not met the eligibility period of employment/service required of someone directly recruited or if the agency worker is no longer on assignment when the bonus is paid (if the same applies to those recruited directly)
- Bonuses which are not directly linked to the contribution of the individual eg a flat rate bonus that is given to all direct recruits to encourage loyalty or long term service
- Discretionary, non-contractual bonuses, as long as these payments have not become ‘custom or practice’

Entitlements which require a period of service

If an entitlement requires a period of service that period will begin at the time the 12 week qualifying period started.

Example: If annual leave entitlement increases after 12 months the Temporary Agency Worker will be entitled to this after 12 months, not 12 weeks and 12 months.

Which bonuses are included and which are not?

The test to establish whether a bonus is included or not is whether the payment or reward is: "directly attributable to the amount and quality of work done by the agency worker". If it is for some other reason eg to reward loyalty, then it is outside the scope of the regulations.

Bonus Payments - Included:

- Commission payments linked to sales
- Bonuses payable where directly recruited staff have met a specific individual performance target
- Bonuses payable on the basis of individual performance over a given period eg 1 year

Bonus Payments - Excluded:

- Bonuses determined by the overall performance of the company where there is no recognition of individual contribution
- Bonuses designed to reward loyalty and service to the organisation and not based on individual contribution

Additional Notes on Bonuses:

- Where an agency worker does qualify for a bonus, they do not have to receive the exact same bonus as any particular directly-recruited worker but should have the same opportunity to achieve a bonus, subject to their individual performance.
- Where bonus payment to a direct recruit reflects performance and time served that would also be the case for an agency worker

Example: If a direct hire is present for 6 months of a reporting year receives 50% of a bonus, this would also apply to an agency worker

Performance Appraisal Systems

- The regulations do not require agency workers to be integrated into performance appraisal systems and there is no requirement to use the same process for assessing performance in relations to bonus payments.
- Conducting an appraisal for an agency worker to establish performance in the role in order to determine this aspect of 'pay' should not itself affect the agency worker's employment status.
- Alternative approaches could include creating a simpler system to appraise agency workers.

What if we give direct recruits an annual pay increment?

The regulations ensure that an agency worker should receive the pay increment they would have been entitled to if recruited directly.

Working Time and Holiday Entitlements

After a Temporary Agency Worker completes the 12 weeks qualifying period in the same role with the same Hirer, they will be entitled to the same terms and conditions relating to the duration of working time, night time, rest periods, rest breaks, annual leave and to be paid at the appropriate overtime rate as if they were recruited directly by the Hirer.

This is in addition to existing rights within the Working Time Regulations 1998.

Most Hirers may already offer some or all of the entitlements to agency workers from day one of an assignment.

Example: If direct recruits have more generous rest break entitlements than the statutory minimum, an agency worker working the same shift and who has completed the 12 week qualifying period will also be entitled to this.

All workers have a statutory entitlement to 5.6 weeks per year which can include bank and public holidays. If a more generous contractual leave entitlement would have been given to a Temporary Agency Worker, if they had been recruited directly by the Hirer, then they should receive the same enhanced entitlement once they have completed the 12 week qualifying period.

What if direct recruits have an incremental annual leave entitlement linked to length of service?

If an entitlement requires a period of service that period will begin at the time the 12 week qualifying period started.

Example: If annual leave entitlement increases after 12 months the Temporary Agency Worker will be entitled to this after 12 months, not 12 weeks and 12 months.

Anti- Avoidance Measures

What is Anti-Avoidance?

The Regulations contain anti-avoidance measures designed to prevent Hirers and temporary work agencies from structuring assignments in order to prevent Temporary Agency Workers from completing the 12 week qualifying period and gaining the relevant entitlements.

What constitutes 'Anti-Avoidance' activity?

Activities that could be considered as anti-avoidance include:

- Supplying the agency worker to connected Hirers
- Rotating workers between assignments
- Repeatedly terminating and reinstating agency workers into the same assignment

When determining anti-avoidance activity the follow assignment structure details will be taken into consideration:

- Length of assignments
- Repeated assignments
- Role changes
- Length of break periods
- Whether the most likely explanation for the structure of the assignment is that the Hirer, connected Hirer or Temporary Work Agency intended to prevent the agency worker from gaining entitlement to the relevant AWR rights and that the agency worker would have gained entitlement had it not been for the assignment structure.

Establishing Equal Treatment

How is equal treatment established?

For the purposes of the regulations the requirement is to:

“Treat the worker as if he or she had been recruited directly to the same job”

Department for Business Innovation and Skills,
Agency Worker Regulations Guidance May 2011

Equal treatment is not required in respect of all the terms and conditions that the person would have received had they been recruited directly. The regulations covers basic working and employment conditions ie those which are normally included in relevant contracts of employment, pay scales/pay structures, relevant collective agreements or company handbooks (or similar) of direct recruits.

For most cases equal treatment will be established by giving the same relevant entitlements to the Temporary Agency Worker as if they had been recruited as an employee or worker to the same job.

How can Hirers ensure they have complied with the Regulations on equal treatment?

If the Hirer identifies an appropriate comparator and treats the agency worker in the same manner.

What is a ‘comparator’ in these circumstances?

- Must be an employee
- Must be engaged in broadly similar work
 - o Account can be taken of their skills and qualifications as this may justify a higher level of pay for the comparator
- Must work at the same workplace
 - o If no comparable employee is in the same workplace, you can take a comparable employee in another of the Hirer’s workplaces

Is it necessary to look for a ‘comparator’?

Guidance on the Regulations states that it is not necessary to look for a comparator. Adding, it is quite possible to identify the appropriate “basic working and employment” conditions without one.

What if the Hirer has pay scales or pay structures?

An example from Regulation Guidelines indicates that if the Hirer would have started a worker at the bottom of the pay scale if recruiting him/her directly this is equal treatment. However if the worker’s experience would mean starting further up the pay scale if recruited directly, then that is the entitlement.

What if the Hirer doesn’t have a formal pay structures?

Hirers would be required to apply the same process in calculating the pay rate for the Temporary Agency Worker’s role based on the same criteria they would use if the Temporary Agency Worker had been recruited directly.

Liability and Information Requests

What information is required by a Temporary Work Agency before placing an agency worker on assignment?

In addition to the information required to meet the Conduct Regulations a Hirer will need to provide the Temporary Work Agency with:

- Level of basic pay (based on annual salary an agency worker would have received if hired directly)
- If and when there are overtime payments, shift/unsocial hours allowances or risk payments for hazardous duties
- Types of bonus schemes and how performance is appraised
- Information on annual pay increments.
- Vouchers which hold a monetary value
- Annual leave entitlement

When should the Temporary Work Agency ask the Hirer for the information relating to basic working and employment conditions?

No timescale has been set out in the regulations. This in order to allow Hirers and Temporary Work Agencies to agree their arrangements between them. Official guidance recommends information is given “at an early stage” or “in advance of the assignment starting”.

Can the agency worker request information?

Yes, if the Temporary Agency Worker believes their entitlements are not being met they can request information. How and when they can do this depends on the information they require:

- Day 1 entitlements:
 - o The agency worker can write to the Hirer for information. The Hirer will have 28 days to respond in writing from the receipt of the request
- Entitlements after 12 week qualifying period:
 - o After the 12 weeks has elapsed, the agency worker can write to the Temporary Work Agency to request information. The agency will have 28 days to respond in writing from the receipt of the request. If the agency worker has not received a written statement within 30 days from request they can then write to the Hirer requesting the same information.

What if an agency worker is unhappy with the response or does not receive a response?

- An agency worker can bring a claim to an Employment Tribunal in relation to their rights in the Regulations.
- An agency worker can bring a claim without a written request.
- A tribunal will not consider a complaint under the Regulations unless it is presented within 3 months of the actual breach although a Tribunal may still consider a complaint if it is just and equitable to do so.

How can Hirers ensure we meet our responsibilities?

- Ensure all ‘Day 1’ obligations are met
- Ensure all necessary information relating to rights after the 12 week qualifying period are provided to the relevant temporary worker agencies.

Who is liable for a breach of regulations?

Day 1 entitlements

- Day 1 entitlements, including provision of information on entitlements, are the responsibility of the Hirer.
- Information might be provided directly to the agency worker or to the Temporary Work Agency which in turn passes it to the agency worker.
- Guidance on the regulations suggested that agencies and Hirers can agree the best course of action between them.

Entitlements after 12 week qualifying period

- For failure to provide basic working and employment conditions, liability can rest with the Temporary Work Agency and/or the Hirer.
- An employment tribunal would examine where the fault of the break lies and will apportion liability and as such any financial penalties accordingly.
- It will be a defence for an agency if it can show they obtained or took “reasonable” steps to obtain relevant information from the Hirer and treated the worker accordingly. If this is established as a defence then the Hirer will become liable for the liability.
- The guidance recommends that it is **“in interests of all parties exchange information in a timely manner”**. Additionally the guidance suggests:
 - o Agencies put in place reminders to check if there have been any changes to any relevant terms, conditions, pay rates
 - o Hirers should notify agencies if they amend their basic working and employment conditions.

What compensation levels can be awarded?

The Temporary Agency Worker will be compensated for any loss of earnings related to their entitlements under the regulations, or receive an appropriate level of compensation eg if they have been denied access to a facility.

There is no maximum award.

There is a minimum award of two weeks of pay regardless of the value of the loss. The Tribunal has the power to reduce this, if they find that the agency worker has behaved unreasonably and it is just and equitable to do so.

The Tribunal can also take into account if an agency worker brings a claim and has not told the agency or Hirer they worked for the Hirer before and therefore were entitled to equal treatment before the 12 weeks had elapsed.

Additionally a Tribunal would need to decide whether a pattern of assignments indicated an intention to deprive the worker of his or her rights weighing evidence from the worker that one or more of the factors applied against evidence from the Hirer/agency that the motivation behind the pattern was different and legitimate.

In these circumstances, the Tribunal may make award of up to £5,000.

Escape and the AWR

How are Escape supporting our clients?

- Meeting our clients
 - o Escape's team of consultants are meeting with all our clients affected by the Regulations prior to October 1st to support their preparation.
- Ensuring we are ready
 - o We have conducted an impact assessment on our business and are currently:
 - Investing in the development of our candidate database & assignment booking system
 - Conducting an internal training programme
 - Developing and embedding new processes across the business
 - Working with our corporate body, REC, and other legal advisors to build our knowledge
- Sharing knowledge
 - o Using information provided by our corporate body, REC, we have developed tools to help our clients and consultants share relevant information and ensure both parties are meeting their AWR responsibilities including a Client Impact Assessment Checklist
 - o We have developed an online resource on www.go-escape.com for Hirers where information including a series of REC AWR Factsheets are available
 - o Escape will continue to provide our free Employment Law Updates prepared by Toni McAlindin.
 - o You can register for our updates in the Client Services page at www.go-escape.com

Escape's AWR Project team:

We recognise the importance of communicating and supporting our clients as we all prepare for the impact of these Regulations.

With this in mind Escape have established an AWR Project Team within the business to coordinate our preparation and provide our clients, temporary workers and employees a central point of contact.

You can contact our AWR team by email at awr@go-escape.com or call us on 01506 461445.

Additional Information and Useful links

This document has been created for your information only. It is not a substitute for legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

Agency Workers Regulations Guidance May 2011

Department for Business Innovation & Skills

<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance.pdf>

Further details can be found in the BIS guidelines on:

- Provision of additional rights during collective redundancy, TUPE consultation and collective bargaining.
- Rules and regulations relating to pregnant agency workers
- Pay between assignment
- Working with multiple temporary work agencies/intermediaries



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