

Client factsheet

Agency Workers

Regulations

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The Agency Workers Regulations come into effect in England, Scotland and Wales on 1st October 2011. They stem from the EU Temporary Workers Directive 2008 and give agency temporary workers the same basic working and employment conditions as employees of your organisation.

The UK has secured a 12 week qualifying period, meaning workers are entitled to these rights after this time. Agency workers are also entitled to Day One rights as soon as any temporary assignment commences.

Who is covered by the Regulations?

These apply to any worker who is supplied by an agency to work temporarily under the supervision of your organisation (the hirer). Self employed workers and those working under managed service contracts are excluded. (Please note workers will fall within the AWR if they are supervised by the hirer or are supplied by an agency to the managed service provider.)

What are Day One rights and how can you ensure you adhere to these?

These relate to two rights that all temporary workers within your organisation must have access to from day one of an assignment.

1. Existing vacancies within the hiring company. You must ensure all your temporary workers have access to information showing the current vacancies at your organisation. There is no need to inform them personally, just to ensure they have the same access to the information as permanent staff.
2. Collective on-site facilities. You must ensure your temporary workers have access to the same collective facilities as permanent staff. These cover childcare facilities, canteens, car parking and the provision of transport services. Please do note that

for facilities that are subject to criteria, such as a waiting list for childcare, temporary workers can be refused this access as permanent staff are and be subject to the same selection criteria. Other benefits, such as subsidised membership of an off-site gym, are outside of the scope of the Regulations and so do not need to be made accessible to Temporary Workers.

Allen Associates urges you to ensure all potential temporary workers will be able to access these rights as your organisation will be in breach of the Regulations, and will be held responsible for this breach by an Employment Tribunal, if they are not accessible to temporary workers.

When does a temporary agency worker qualify for equal treatment?

The agency worker needs to have worked for 12 weeks for your organisation in the same role. This 12 week period is irrespective of how many hours in each week the temporary worker actually worked, i.e. full or part time. Changing agency but keeping the same worker does not stop the clock on the qualifying period.

Please do note that a new role does re-start the clock on the 12 week period but the role has to be 'substantively different', rather than a new job title or the same role in a different department. For example, administration support in one department followed by an administrative support role in another department will be considered the same role for the purposes of the Regulations.

The qualifying period can be paused, although not stopped, under the following circumstances if the temporary worker:

- takes a break of 6 weeks or less, the break can be for any reason. The clock starts again if the worker returns to the same role.
- is on certified sick leave for 28 weeks or less
- is on statutory maternity/adoption or paternity leave
- has to attend Jury service

Auto-enrolment

What is Equal Treatment?

The entitlements covered by this term are as follows:

- Key Elements of Pay (please see details below)
- Duration of working time
- Night work
- Rest periods and breaks
- Annual leave

Pay

This relates to the basic hourly rate and any additional entitlements that are directly linked to the work done by the agency worker during the assignment. This covers shift allowances, unsocial hours, overtime, stamps and vouchers with a monetary value (not salary sacrifice schemes) alongside holiday pay and bonuses that specifically relate to the quality and quantity of the work carried out.

Comparable pay is where the role covered by the temporary worker would be placed should they be a new starter within the organisation on a permanent basis. For example, if a temporary worker is covering a PA position where the permanent post holder is actually an experienced member of the team on a high salary but the role would be recruited for at an entry level salary for a PA if the position was being replaced, then the temporary worker would be entitled to the entry level salary not that of the specific person they are covering for

In relation to bonus payments, these are only applicable if comparable workers receive bonus payments that are directly attributable to the worker's performance and not if the bonus is given to encourage loyalty or to reward long term service.

Annual leave

After the qualifying period, temporary workers will be entitled to any holiday payments in addition to statutory holiday pay that permanent staff receive.

The regulations do not alter the employment status of temporary workers so they are not entitled to the following:

- the right to claim for unfair dismissal
- redundancy pay, maternity pay, occupational sick pay
- company pension schemes, share option schemes, loans, expenses
- health/life insurance
- financial participation schemes
- bonus payments based upon organisational or company performance i.e. not directly related to the role carried out by the temporary worker

These exclusions mean temporary workers will continue to be a flexible labour force for your organisations.

Establishing equal treatment - how will this work in practise and who is responsible?

In brief, temporary workers need to be treated the same as your direct employees in comparable or broadly similar roles, once the qualifying period is reached. If an exact comparable role does not exist, there should be other roles that can act as a reference point, such as pay scales and benefits outlined in company handbooks. Day One rights - these are solely the responsibility of your organisation as they are outside the control of the agency.

Agencies will be responsible for ensuring their workers receive equal treatment however they will have a defence against any unfair treatment claims if they have undertaken reasonable steps to ensure relevant information is obtained from their clients. This means that agencies and hirers need to work together to ensure treatment is equal. It is important to be aware that Tribunals will look at individual cases to see where the fault lies and will apportion blame to agency and/or hirer accordingly.

Auto-enrolment

Other points to be aware of (once the qualifying period is reached):

Pregnant agency temporary workers will be entitled to paid time off for medical appointments and ante-natal classes. It is important not to end assignments solely on the grounds of pregnancy as this would constitute sex discrimination against the worker.

Anti-avoidance measures will mean if assignments are structured in such a way as to deliberately prevent workers reaching the qualifying period, tribunals will find that hirers, or agencies, have breached the regulations.

The Regulations will not be retrospective, therefore any time spent on assignments by temporary workers up to and including September 30th 2011 will not count towards the qualifying period. In fact, Christmas Day 2011 is the first day in which a worker could potentially be within the Regulations!

There are no restrictions on temporary workers being requested for periods of less than 12 weeks. The only changes to these assignments will be the Day One rights.

An agency worker will be entitled to bring a claim for unfair treatment against the Agency, the hiring organisation or both. The Employment Tribunal will be responsible for deciding who is in breach.