

## Agency Workers & the Agency Workers Regulations 2010

*This advice note summarises the law in England and Wales relating to an agency worker's rights and whether a 'temporary work agency' (the agency) or a 'user undertaking' of the agency (the hirer) is responsible for providing those rights.*

### Introduction

An agency worker's rights generally depend on whether the individual holds the status of either an 'employee' or a 'worker'. However, there is also legislation that deals specifically with the rights of agency workers irrespective of whether they have employee or worker status.

### What is an agency worker?

An agency worker is someone who is supplied by an agency to work for a hirer and:

- There is a contract between the agency worker and the agency;
- The contract between the agency worker and the agency is either a contract of employment or any other contract to perform work and services personally;
- There is also a contract between the agency and the hirer;
- There is no contract between the agency worker and the hirer;
- The work is temporary or for a fixed period;
- The work is carried out under the supervision and direction of the hirer; and
- Under the contract the agency usually pays the agency worker after deducting PAYE and NICs.

### Is an agency worker a 'worker' or an 'employee'?

This is an important distinction, because a 'worker' has fewer rights than an 'employee'. If an agency worker is found to be either an employee or a worker, then s/he will have all the usual rights that attach to that particular status.

It is not always easy to distinguish between an employee and a worker. Both law and fact will need to be considered in order to determine the reality of the situation.

Some factors to consider are:

- The length of the arrangement;
- Whether the individual provided his or her own skill and work, and whether this was in return for a wage or other remuneration;
- Whether the organisation has day-to-day control over the individual;
- Whether the individual has to wear a uniform or use his or her own equipment;
- Whether the individual was sufficiently integrated into the organisation;
- Whether the individual was in business on their own accord.

## **The Agency Workers Regulations (AWR) 2010**

The AWR 2010 came into force on 1 October 2011 and deal specifically with the rights of agency workers, irrespective of whether they are employees or workers.

### **Agency workers rights under AWR 2010 from the first day of assignment**

With effect from day one of an assignment, all agency workers must:

- Have access to information about any vacant posts the hirer may have available during the assignment;
- Have the right to be treated no less favourably than a comparable employee or worker in accessing a hirer's facilities and amenities (unless the favourable treatment is objectively justified).

These rights are the hirer's liability and examples of collective facilities include:

- Canteens;
- Childcare facilities;
- Transport services;
- Toilet and shower facilities;
- Staff common room, waiting room, prayer room, etc
- Car parking etc.

In addition, the right:

- Only applies to onsite facilities;
- Does not extend to benefits such as subsidised access to a gym.

### **Agency workers rights under AWR 2010 following a 12-Week qualifying period**

After completion of a period of 12 continuous calendar weeks in the same role with the same hirer (12-week qualifying period), agency workers are entitled to the same 'basic working and employment conditions' as an employee or a worker recruited directly by the hirer.

A calendar week is any period of seven days. The number of hours a worker works on a weekly basis is not relevant when calculating a calendar week.

Continuity will be preserved if an agency worker is absent because of pregnancy, childbirth or maternity and for 26 weeks after childbirth or if an agency worker is on maternity, paternity or adoption leave (if entitled).

An agency worker who started employment before 1 October 2011 would not begin the 12-week qualifying period until that date.

### **Basic Working and Employment Conditions**

The entitlement to basic working and employment conditions, attained after the 12-week qualifying period includes:

- Pay:
  - Any basic pay, fee, bonus (linked directly to the work done by the agency worker), commission, holiday pay, overtime or other emolument;
  - Excludes incentives, rewards, contractual notice pay, contractual redundancy pay, pensions, benefits, bonuses (not directly linked to the work done by the agency worker) and occupational maternity, paternity and adoption pay;
- Working hours:
  - Include the same duration of work and rest breaks as an employee.
- Holiday entitlements:
  - Include the same amount of annual leave as an employee;
  - Can be made as a payment in lieu.

- **Maternity rights:**
  - Include paid time off for travelling to and attending antenatal appointments and antenatal classes for pregnant workers;
  - Include the right for alternative work at the same pay where a pregnant agency worker or a nursing mother is unable to continue in their current role because of health and safety reasons. If this is not practicable, then the right to be paid by the agency during the remaining expected duration of the assignment;
  - Exclude additional maternity pay;
  - Exclude a right to return to the same or similar job following a period of leave related to birth or adoption (although the agency worker retains the right not to be directly or indirectly discriminated against due to pregnancy or childbirth).

### **Discrimination**

In some circumstances, the agency worker may be protected against discrimination under the Equality Act 2010. This protection can cover the acts and omissions of both the agency and the hirer.

### **Working Time Regulations 1998**

Agency workers are entitled to protection under the Working Time Regulations 1998. The party with specific responsibility for paying the agency worker will be responsible for complying with the regulations.

### **National Minimum Wage**

An agency worker has the right to be paid the national minimum wage.

### **Statutory Sick Pay (SSP)**

An agency worker will, in most cases, be entitled to receive SSP payable by the agency. The agency worker will, of course, have to satisfy the same qualifying conditions as an employee for payment of SSP.

### **Maternity, Paternity or Adoption Leave and Pay**

An agency worker is entitled to receive statutory maternity, paternity or adoption pay, provided the agency pays their tax and NI contributions but will only be entitled to maternity, paternity or adoption leave provided they are an employee of the agency.

### **Flexible working**

Agency workers do not have the right to request flexible working. However, a female agency worker who requests a change of hours to suit childcare commitments may be able to claim indirect sex discrimination if the request is unreasonably refused.

### **Protection for Whistleblowers**

Agency workers have the right not to receive detrimental treatment as a result of whistleblowing.

### **Data protection**

An agency worker will be entitled to the same protection as an employee and worker under the Data Protection Act 1998 (DPA). Both the agency and the hirer will be obliged to comply with the DPA in order to protect the personal data that they process and hold about the agency worker.

## **Pensions**

On 1 October 2012, new laws came into force requiring all employers in Great Britain to automatically enrol jobholders in a pension scheme. Introduction is staged, dependent on the size of employer. Agency workers are jobholders and whichever of the agency or hirer is responsible for paying the agency worker will then count as the agency worker's employer for the purposes of auto-enrolment.

## **Vicarious liability**

The hirer is vicariously liable for acts and omissions of the agency worker.

If you would like further advice on this topic or more specific information please contact Nick Jones on 0117 904 5912 or [njones@lyonsdavidson.co.uk](mailto:njones@lyonsdavidson.co.uk)

*The purpose of this general advice note is to provide a general summary of information around a specific topic. It should not be taken as legal advice and should not be relied on as such. We recommend that you always obtain specific legal advice in respect of a particular issue or matter. Please contact our employment team if you have a question about anything related to the subject matter of this note.*

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