# The Agency Worker Regulations 2010 – What you should know

There has been a great need for many years for legal clarity in the area of agency work and we may finally have that need addressed through the Agency Worker Regulations 2010. The Regulations come into force from 1st October 2010 and will provide agency workers entitlement to the same or no less favourable treatment as comparable employees with regard to basic employment rights and working conditions if and when they complete a qualifying period of 12 weeks in a particular job.

However, whilst this appears to be a positive step for agency workers, it is likely to create a logistical nightmare for employers. Dippalli Naik of Sydney Mitchell LLP explains the Regulations and the ramifications in practice below.

## Who do the Regulations cover?

Agency workers supplied to a hirer by a temporary work agency will be covered, including 'temps'. They will also apply to agency workers provided via intermediaries.

The Regulations will not protect the genuinely self-employed, people working via self-owned limited liability companies and those working on managed service contracts.

## What rights are provided?

During the first 12 weeks of employment, called the Qualifying Period, agency workers will have access to the same company facilities as comparable employees of the Hirer Company, such as staff canteens and in-house crèches. They will also be entitled to know about job vacancies in the organisation. If agency workers are not allowed this access and cannot objectively justify why then the Hirer Company will be liable for the breach.

Once the Qualifying Period has been completed, agency workers will be afforded the same basic conditions of employment as any comparable employee of the hirer company, i.e. as if they had been directly hired by the company from day one. Specifically these conditions are defined as:

1. Pay (including fees, bonuses, commissions, overtime rates and holiday pay but excluding redundancy pay, contractual sick pay, pensions and maternity, paternity or adoption pay).
2. Duration of working time
3. Night work
4. Rest periods
5. Rest breaks
6. Annual leave

If agency workers are denied these basic rights then the agency supplying them will be liable for the breach.

## Does the Qualifying Period have to be continuous?

Agency workers do not have to be working continuously for 12 weeks to gain rights. The Regulations provide for situations where breaks can occur and do not prevent agency workers from completing the Qualifying Period. However there are occasions where the Qualifying Period will restart after a break. I set out below the different circumstances that could apply:

1. <u>Reasons for the Qualifying Period to restart after a break</u>

- When an agency worker begins a new assignment with a new hirer

- When an agency worker continues with the same hirer but is no longer in the same role.

- When there is a break between assignments with the same hirer of more than 6 weeks (which is not one which pauses accrual or during which it continues to accrue)

2. Reasons for the Qualifying Period to pause during a break

- When there is a break for any reason which is no more than six calendar weeks long and the agency worker returns to the same role with the same hirer
- When there is a break of up to 28 weeks because the agency worker is sick or injured
- When there is any break for the purpose of taking leave to which the agency worker is entitled, including annual leave
- When there is a break of up to 28 calendar weeks to allow the agency worker to perform jury service
- When there is a break caused by a regular and planned shutdown of the workplace by the hirer (for example at Christmas)
- When there is a break caused by a strike, lock out or other industrial action at the hirer's establishment

3. Reasons when the Qualifying Period will continue during a break

- Pregnancy, childbirth or maternity related breaks which take place during pregnancy and up to 26 weeks after childbirth.
- When there is a break related to taking maternity leave, adoption leave or paternity leave.

## What is a comparable employee?

As mentioned above, the point of the Regulations is to ensure that agency workers have the same basic rights as comparable employees, once they have accumulated 12 weeks service. To identify such an employee the following criteria should be addressed:

1. The employee and the agency worker must be working for and under the supervision of the same hirer company
2. The employee and the agency worker must be carrying out the same or broadly similar work
3. The employee works or is based at the same establishment as the agency worker (unless one cannot be found in which case an employee from a different establishment of the Hirer Company can be used).

## How can complaints about unequal treatment be made?

After completing the Qualifying Period, an agency worker has the right to request from his/her agency details of how pay and conditions have been determined to ensure equal treatment exists. If the agency does not respond within 28 days the agency worker can approach the Hirer Company for the same information. Neither have the legal duty to respond but failure to provide the information will be regarded adversely should the agency worker then make a claim.

If the agency worker still believes he/she has not received the correct entitlement, they can make a claim to the Employment Tribunal usually within 3 months of the assignment. The claim can be against the agency, the Hirer Company or others in the chain such as an umbrella company.

## Who is liable?

If an agency worker had to make a claim, the Employment Tribunal would assign the liability to whichever organisation(s) it decided had caused the disadvantage to the agency worker. If the agency were able to show that it had made all reasonable efforts to establish and apply equal treatment, then the liability would pass to the hirer or some other part of the chain. However any failure to provide the entitlements owed during the first 12 weeks would lie solely with the Hirer Company.

## What should you do in practice?

As the hirer company:

Provide your agency with up to date information on your terms and conditions so that they can ensure that an agency worker receives the correct equal treatment, as if they had been recruited directly, after 12 weeks in the same job. You are responsible for ensuring that all agency workers can access your facilities and are able to view information on your job vacancies from the first day of their assignment with you.

You should also keep records of the different agency workers you employ and their start dates so that you can keep track of the Qualifying Periods. This will prove to be one of the main hindrances for companies as there could be any number of agency workers in the establishment, all with different start dates, comparators and breaks to monitor.

Suffice it to say, it is likely that this legislation will be very unpopular with hirer companies and will increase costs and administration at a time when businesses are trying to control finances and use the most efficient cost effective methods available to carry out their work. It could also result in many agency workers not obtaining work as easily as before, as they will no longer be seen as a cheaper more feasible alternative to employing permanent staff.

As the temporary work agency:

If you are involved in the supply of temporary agency workers, you need to ask the hirer company for information about pay and basic working conditions (when it is clear that the agency worker will be in the same job with the same hirer for more than 12 weeks) so that they are treated as if they had been directly recruited to the job.

It will also be imperative to keep clear records of the agency workers you deploy and how they are being treated within hirer companies to ensure that you are protected should any future claim arise.

In practice you may also find it harder to place people in hirer companies for long periods of time, as there will no doubt be companies that will try to avoid the Qualifying Period if they can. However there are strict anti avoidance provisions in the Regulations and if a company is found to have attempted to avoid its duties it could be subject to a £5000 fine.

## Conclusion

Whilst the Regulations are going to throw up a number of issues for all parties involved, at least in the initial months of its implementation, there are steps you can consider to minimise the disruption. The simplest reaction would be to accept that all agency workers are equal to employees from the beginning and treat them all in the same way – idealistic perhaps! Another option will be to convert agency staff into employees so that the Regulations do not come into play. However this may not be practical for all businesses and will provide full employment rights to staff that you may not wish to keep long term and that may not wish to be employees. Finally you can consider engaging contractors direct without the need for a temporary worker agency, which will fall outside the Regulations, but could result in you paying higher rates. In short, there is no easy fool proof way to deal with this new law but if you tackle the task

sooner rather than later and develop systems to deal with the changes, the transition should be relatively painless!

If you need guidance on how to deal with the new Regulations or have any questions about Employment Law and practice generally, we at Sydney Mitchell are here to help. Our team of dedicated Employment Solicitors are on hand to walk you through any employment problems you encounter in your business or in the workplace and can advise you on all aspects of Employment Law generally whenever you need them. For further information on the firm and the Employment Team please contact us on 0121 698 2200 or visit our website at *www.sydneymitchell.co.uk*.