

# Agency Workers Regulations 2010

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# Key points

- Came into force 1 October 2011
- Basic principle – agency workers to have working and employment conditions as if employed directly by hirer
- 12 week qualifying period
- Plus other day 1 rights
- Ways to achieve compliance

# Who is an agency worker? (1)

- An individual:
  - supplied by a temporary work agency
  - to work temporarily
  - for and under the supervision and direction of a hirer
  - who has a contract of employment **with the agency** or any other contract with the agency to perform work or services personally

## Who is an agency worker? (2)

- Will not include:
  - casual workers not supplied via third party agencies
  - genuinely independent contractors
  - managed service contracts where workers are not under the direction or supervision of the hirer
  - secondees (ordinarily)

# Equal treatment

- Same basic working and employment conditions as those “ordinarily included in contracts of employees/workers of the hirer”
- Assessment of
  - ordinary contractual terms, usually set out in:
    - standard contracts
    - a relevant scale or pay structure
    - a relevant collective agreement
    - a contractual staff handbook

# Equal treatment – what does it include?

- pay
- working time
- length of night work
- rest periods
- rest breaks
- annual leave

# “Pay” includes

- Basic pay
- Fees
- Holiday pay
- Overtime pay
- Commission
- Bonuses linked to individual performance
- Shift allowances
- Unsocial hours premiums
- Payments for difficult and dangerous duties
- Vouchers or stamps with fixed monetary value

# “Pay” excludes

- Company sick pay
- Pension
- Allowances or gratuities in connection with retirement
- Compensation for loss of office
- Company maternity, paternity or adoption pay
- Redundancy pay
- Payments or rewards under a financial participation scheme (eg. share option scheme)
- Bonuses not attributable to the work done
- Expenses

# Providing equal treatment

- Must there be a comparator?
- BIS guidance:

*“In most cases equal treatment can simply be established by giving the same relevant entitlements ‘as if’ he/she had been recruited as an employee or worker in the same job ...**It is not necessary to look for a comparator** ...it is quite possible to identify the appropriate ‘basic working and employment conditions’ without one.”*

# Equal treatment

- Defence if agency worker has same terms as actual comparable full time worker:
  - hirer's employee
  - same or broadly similar work
  - same establishment (or if none, at a different establishment)

# Maternity rights

- After 12 weeks
  - Paid time off for ante-natal appointments
  - Entitled to suitable alternative work if assignment no longer appropriate on health and safety grounds or must be paid by the agency for duration of original assignment
- No new rights to maternity leave, etc
- Discrimination laws still apply

# Qualifying period

- 12-week qualifying period in the same role with the same hirer
- Starting from 1 October 2011
- Calendar weeks
- Any week or part of week counts
- Break of 6 weeks needed to break continuity

# Pauses to qualifying period

- Time does not accrue:
  - a break of less than six calendar weeks
  - sickness (of 28 weeks or less)
  - statutory or contractual leave (other than maternity, paternity or adoption leave)
  - jury service (of 28 weeks or less)
  - temporary cessation of work for pre-determined period (eg. summer closure)
  - industrial action
- Work on either side of these breaks - joined together

# Breaks where the clock still ticks

- Break related to protected period attaching to pregnancy, child birth, or maternity
- Maternity, adoption or paternity leave
- Worker deemed to continue in same role (and to accrue qualifying service) for intended or likely duration of original assignment

# Avoiding the 12 weeks?

- BEWARE: an agency worker will still be treated as having completed 12 weeks' service if the hirer has attempted to use a "structure of assignments" to avoid the Regulations
- Any difference in role between two assignments with the same hirer must be genuine
- Anti-avoidance provisions in the Regulations with additional compensation attached

# Stop the clock?



- An agency worker works in a factory and has an assignment which starts for 2 weeks before it closes during the summer period. After the closure, the worker works in the same role for a further 11 weeks

# Stop the clock?



- An agency worker works for 7 weeks and then does a long period of jury service for 14 weeks. He comes back to the same role for 7 more weeks.

# Stop the clock?



- An agency worker has worked for 10 weeks with the hirer. He has a break of 5 weeks between assignments and then is absent due to sickness for 2 weeks. He comes back to the same role for a further 3 weeks.

# Stop the clock?



- o An agency worker works in a factory for 7 weeks. He has a break for 2 weeks and then works for the same employer in an administrative role for a further 6 weeks

# Other rights

- From day one:
  - equal access to collective facilities and amenities:
    - canteen or other similar facilities
    - child care facilities
    - provision of transport services

note: defence of objective justification
  - right to be told of and given opportunity to access vacancies

# Liability

- Broadly - hirer and agency each liable to the extent they are responsible for the breach
- Reasonable steps defence for agency (not hirer)
- Hirer liable for day one rights (not agency)

# Right to information

- Worker can request information if suspects rights breached
- Tribunal can draw inferences from failure to respond

# Remedies

- Claim to Tribunal
- Within three months of alleged breach
- Remedies:
  - declaration of rights
  - recommendations
  - compensation
    - just and equitable
    - not normally less than two weeks' pay
    - additional award of up to £5,000 for “structured assignments”

# Agency Workers Regulations

- Next steps for hirers
  - comply with information requirements
  - provide access to facilities and vacancies
- Avoiding the implications?
  - stop using agency workers?
  - ensure 12 weeks never reached?
  - use casuals employed directly?
  - give other staff more overtime?
  - use independent contractors?
  - the “Swedish derogation”?

# The “Swedish derogation”

- Possible exemption in relation to pay and holiday pay
- Permanent contract between agency and agency worker
- Agency must pay agency worker between assignments
- Rules on ending this type of contract – 4 weeks’ pay
- A complete/incomplete solution?

# The “Swedish derogation”

- An agency worker works for a hirer for 4 weeks at £10.00 per hour for 40 hours. The agency cannot find the agency worker a suitable job the next week.
  - How much is the agency worker entitled to be paid for that week?
- The agency worker gets another assignment for 3 weeks but then the agency decides to terminate his contract.
  - How much is the agency worker entitled to be paid on termination?

# Case study

(1)

- *Robbie is a temporary agency worker. He is sent on an assignment with TT Ltd in a front of house role, starting on 10 October 2011 and working 35 hours per week. It is his first assignment with TT Ltd and he works there for 10 weeks without a break.*
  - What rights is Robbie entitled to at TT Ltd?
  - TT Ltd has a staff canteen which offers subsidised food for workers and full price food for visitors, can Robbie use this? How much must he pay?
  - TT Ltd offers a counselling service to all employees. Robbie is feeling a bit pressurised at being back at work, can he use the counselling service?

# Case study

(2)

- *TT Ltd is really busy and needs Robbie to stay on longer as he has proved to be a really good worker. It contacts the agency and requests him for another 4 weeks.*
  - What additional rights does Robbie have?
- *Robbie goes off sick after 13 weeks of working for TT Ltd. It offers employees full pay for up to 20 days per annum.*
  - Can Robbie claim sick pay?
  - Does this period of sickness absence reset the 12 week clock to zero?

## Case study

(3)

- *Robbie finds out that Gary is being paid overtime and Robbie has been working the same hours as Gary. He also learns that Mark received a bonus and access to a crèche for his son. Robbie feels aggrieved by this and wonders what rights he has.*
  - Does Robbie have a right to these benefits?
  - Does it matter what type of bonus Mark received?

## Case study

(4)

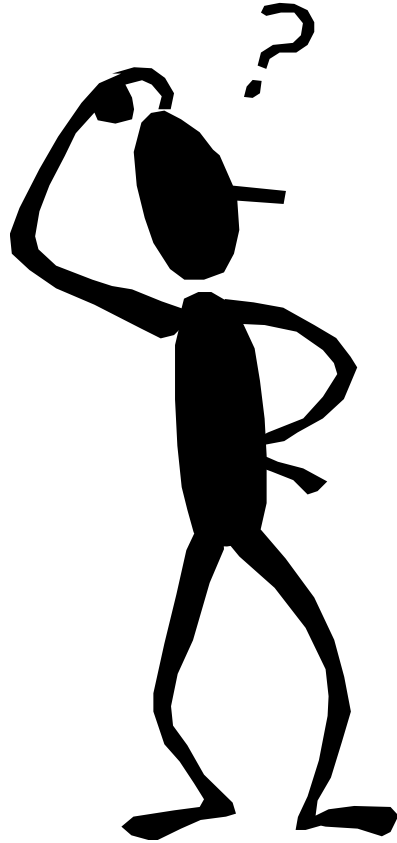
- *TT Ltd loses its main contract and times are not looking good. It has no choice but to make redundancies.*
  - Would Robbie be entitled to a redundancy payment?

# Case study

(5)

- *In the alternative...TT Ltd contacts the agency who supplies Robbie as it realises that it's paying quite a lot of money to keep him on. It has heard that there is a way of avoiding paying Robbie the same as Gary if the agency enters into a permanent contract with Robbie.*
  - Can the agency do this?
  - Robbie enters into a permanent contract with the agency. Are there any special provisions the contract must contain?
  - Robbie works for TT Ltd for 20 weeks. The work then comes to an end and the agency has to decide what to do. Can it terminate Robbie's contract?

# Questions!



# thank you



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