



Who is deemed an agency worker?

The Agency Worker Regulations 2010

Effective: 1st October 2011

An **Agency Worker** (often referred to as a 'temp') is someone who has a contract with the **Temporary Work Agency (TWA)** (an employment contract or an agreement to perform work or provide services personally) but **works temporarily for and under the direction and supervision of a Hirer**. The unique, **tripartite relationship** between agency worker, agency and hirer is a key feature of these Regulations.

For someone to be an agency worker, the following should apply:

- the existence of a contract (an employment contract or an agreement to perform work or provide services personally) between the worker and an Agency;
- that worker is temporarily supplied to a hirer by the TWA; and
- when working on assignment the worker is subject to the supervision and direction of that hirer and,
- the individual is not in a business on their own account (i.e. where they have a B2B relationship with the hirer who is a client/customer)

NOTE: In the event of a dispute, it will be for the Courts to decide the reality of the relationships between the parties involved.

A Summary of Entitlements

From Day 1

1. **Information on job vacancies.** This will not apply if posts have been advertised to at risk employees from within the organisation and the recruitment exercise is in connection with a genuine redeployment situation. It also does not mean that the agency workers can short-cut any part of the recruitment process should they apply for a post.
2. **Access to facilities** e.g. child care facilities, canteen, parking etc. This does not mean that the agency worker has enhanced rights i.e. if there is a waiting list for crèche facilities or parking, this also applies to the agency worker. It does not apply to 'off site' facilities e.g. gym membership. In the case of access to information on job vacancies,



Objective Justification for Less Favourable Treatment

This is the only element of these Regulations where there can be objective justification for less favourable treatment. Cost may be one factor to take into account but it is unlikely that this alone will justify different treatment. Practical and organisational considerations could also be a factor. Even if there is objective justification, it is advisable to consider whether it is possible or feasible to offer agency workers certain access to facilities on a partial basis, as an alternative to excluding them altogether.

Comparable worker

For access to facilities it will often be clear what is required however, if it is necessary to examine the Agency Worker alongside a comparable worker, it is important to ascertain that the following applies:

- The employee or worker is doing the same or broadly similar work to the agency worker
- The employee or worker is working at the same location as the agency worker or, if there is no such person, be in another location owned by the hirer.

If there are no comparable workers or employees there is no entitlement to equal treatment.

For access to information about vacancies, this is limited to where there is a comparable employee or worker currently based at the same establishment.

What the Hirer must do:

If your Company hires agency workers, **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.

After 12 weeks in the same job with the same hirer

The entitlements then extend to **pay** and other **basic working conditions** (annual leave, overtime, etc). Pregnant agency workers are also allowed to take paid time off for ante-natal appointments during an assignment.

In summary the entitlements include:

- key elements of **pay**
- duration of working time e.g. if working is limited to a maximum of 48 hours a week
- night work
- rest periods
- rest breaks
- annual leave
- paid time off for ante natal appointments



'Pay' includes:

- basic pay based on the annual salary an agency worker would have received if recruited directly
- overtime payments, subject to any requirements regarding the number of qualifying hours
- shift/unsocial hours allowances and any risk payments
- payment for annual leave (**NOTE:** any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate)
- bonuses or commission payments directly attributable to the amount or quality of the work done by the individual. This can include commission linked to sales or production targets and payments related to quality of personal performance.
- vouchers or stamps which have monetary value and are not salary sacrifice schemes e.g. luncheon vouchers
- additional discretionary, non-contractual bonuses e.g. one off payments [CLARIFY]

'Pay' excludes:

- occupational sick pay
- occupational pensions (agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012)
- occupational maternity, paternity or adoption pay
- redundancy pay (statutory and contractual)
- notice pay (statutory and contractual linked to loss of employment)
- payment for time off for Trade Union duties
- guarantee payments if laid off
- advances in pay or loans e.g. for season tickets
- expenses e.g. accommodation and travel expenses
- payments or rewards linked to financial participation schemes such as share ownership schemes
- overtime or similar payments where the agency worker has not fulfilled qualifying conditions required of someone directly recruited.
- the majority of benefits in kind
- any payments that require an eligibility period of employment/service, if not met by the agency worker or if the agency worker is no longer on assignment when the bonus is paid
- bonuses which are not directly linked to the contribution of the individual e.g. a flat rate bonus that is given to all direct recruits to encourage loyalty or long term service
- additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice [CLARIFY]

Bonuses linked to individual performance

These apply to the Agency Worker where the bonus or incentive payment or reward is directly attributable to the amount and quality of work done. It is not relevant if it is for another reason other than the amount or quality of the work e.g. a loyalty award.

Annual pay award

Where an annual pay increment applies, an agency worker should receive the pay increment that he or she would have been entitled to if recruited directly to do the same job.



Annual leave

As with rest breaks, if a hirer would have given a more generous contractual leave entitlement to the agency worker if recruited directly to fill the same job, the agency worker concerned should receive the same enhanced entitlement once the 12-week qualifying period has been fulfilled. Agents may deal with any additional entitlement over and above the statutory entitlement, as a one off payment at the end of the assignment or as part of the hourly/daily rate.

Appraisal

The Regulations do not require integration of agency workers into performance appraisal systems for someone directly recruited. It may be easier in some circumstances to fully integrate the agency worker but it is not a requirement. However, systems may need to be implemented to ensure that the worker can be properly assessed in order to achieve bonuses etc. to which they may be entitled and therefore a simplified appraisal or system of assessment is encouraged.

Pregnant Workers and New Mothers

The following applies:

- After completing a 12 week qualifying period in a given job, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment. The agency must facilitate the payment.
- If they can no longer complete the duties of the original assignment for health and safety reasons, they will also need to be found alternative sources of work, paid at the same rate or higher than the original assignment **by the agency**.
- If alternative work cannot be found, then the pregnant woman will have the right to be paid **by the agency** for the remaining expected duration of the original assignment.
- This provision does not give the agency worker any additional entitlement to maternity, paternity or adoption rights beyond those to which they would otherwise have been entitled.

Responsibility of the hirer towards pregnant workers

- When a risk assessment is required, it is the hirer's responsibility to carry one out and where a risk is identified, the hirer is obliged to make adjustments to remove the risk.
- If an adjustment is not possible or reasonable and would not remove the risk, the hirer must inform the agency who will offer suitable alternative work if available.

A Summary Of What the Hirer must do:

If your Company hires agency workers, **you will need to 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 entitlements after 12 weeks in the same job. Don't forget that this includes details of annual pay reviews. You will need to undertake any risk assessments for pregnant workers and endeavour to act upon these but refer back to the Agency where the requirements genuinely cannot be met.



Exclusions

Does not apply to managed service contracts, bank staff, individuals employed to a permanent post from an agency or secondments. However, do be aware that these groups may be subject to entitlements under other areas of legislation.

HIRERS ARE encouraged to think about developing an induction pack for agency workers so that the entitlements are clear.

Technical Aspects Of The Regulations

Calculating the 12 Week Qualifying Period

The 12 week qualifying period is triggered by **working in the same job with the same hirer for 12 calendar weeks**.

A calendar week comprises any period of seven days starting with the first day of an assignment. Calendar weeks are accrued regardless of how many hours the worker does on a weekly basis. Therefore, even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after 12 calendar weeks.

An agency worker can qualify for equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one TWA over the course of that period of time.

The Qualifying Clock

Given that working patterns of agency workers can be irregular, the Regulations provide guidance as to circumstances which allow for breaks in an assignment which nonetheless do not prevent the worker from completing the qualifying period.

Guidance encourages that we think of the qualifying period as a clock which runs from 0 to 12. Sometimes a gap between assignments or a move to a new assignment will mean that the clock is reset to 0 and must start again. Sometimes other circumstances will mean that the clock is paused but will continue to tick when the agency worker returns to the hirer. ***N.B. The clock is not retrospective so will not take account of periods worked prior to 1st October 2011.***

This can be summarised as follows:

Reasons for the qualifying clock to reset to zero

1. Because an agency worker begins a new assignment with a new hirer
2. The agency worker remains with the same hirer but is no longer in the same role.
3. There is a break between assignments with the same hirer of 6 weeks or more and that break does not fall under any of the specific categories which are deemed to pause the clock

Reasons for the qualifying clock to pause

1. A break for any reason where the break is no more than six calendar weeks
2. A break of up to 28 weeks because the agency worker is incapable of work because of sickness or injury
3. Any break which is for the purpose of taking leave to which the agency worker is entitled, including annual leave



4. A break up to 28 calendar weeks to allow the agency worker to perform jury service
5. A break caused by a regular and planned shutdown of the workplace by the hirer (for example at Christmas)
6. A break caused by a strike, lock out or other industrial action at the hirer's establishment

Reasons for the qualifying clock to continue to tick in the event of break

1. Breaks due to pregnancy, childbirth or maternity which take place during pregnancy and up to 26 weeks after childbirth.
2. Any breaks due to the worker taking maternity leave, adoption leave or paternity leave.

In each of these cases the clock will continue to tick for the originally intended duration of the assignment, or the likely duration of the assignment (whichever is longer).

Definition of New Hirer

The qualifying clock will be reset to zero if the agency worker stops working for one hirer and begins working for another.

A new hirer for this purpose must be a different person, or be a different legal entity.

Where a hirer has multiple sites, merely moving the worker from one site to another will not usually break continuity unless it is a substantively different role.

Where a hirer is part of a larger group and each company has its own legal identity, then the qualifying period will restart when an agency worker moves between the different legal entities.

Definition of Substantively different

If there is a substantive change to a job role within the same hirer, the qualifying clock is reset to zero. For this to apply, the work or duties which make up the whole or main part of a role must be substantively different. It will not suffice that the agency worker moves departments but does similar work, a line manager changes or a different rate of pay applies.

A Summary of What the Hirer must do:

In order for the 12 week qualifying clock to be reset to zero, the hirer must notify the agency that the work or duties have changed and this information must be passed to the agency worker. A hirer must notify an agency in writing when there is a new role that is substantively different and record details of on the job requirements.



Anti Avoidance Provisions Of The Regulations

Hirers and Agencies should be aware of the anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the qualifying period

An example of this would be moving a worker to and fro across Group companies, a pattern of breaking service at the point where the qualifying clock is reset etc. where there is the intention to prevent the receipt of equal treatment and accrual of entitlements. This is a matter that a Tribunal would assess.

How equal treatment is established

Deciding what equal treatment means is usually obvious and a matter of common sense. The requirement is to treat the worker as if he or she had been recruited directly to the same job.

It covers basic working and employment conditions which are ordinarily included in the following:

- Standard contracts
- Pay scales or pay structures
- Relevant collective agreements
- Company handbooks or similar

In most cases equal treatment can be simply established by giving the same relevant entitlements **as if** the individual had been recruited as an employee or worker to the same job.

Employee Representation Bodies

From 1 October 2011 temporary agency workers will count towards the thresholds in Temporary Work Agencies for the purposes of calculating the thresholds above which a representative body may be established. This will not apply to agency workers that are employees of the Agent.

In the case of workers' representatives and where there is a statutory obligation to provide certain information e.g. in collective redundancy and TUPE situations, you must provide relevant information on the use of agency workers supplied in all the situations where there is currently an obligation on employers to provide information on the employment situation. The information must include:

- the total number of agency workers engaged
- the areas of the business in which they are utilised
- the type of work they are contracted to undertake

The regulations do not provide new representational or consultation rights to Agency Workers

The law does not apply to the establishment of a representative body for the purposes of collective redundancy.



Other Rules For Agencies

Other rules that apply to agencies who offer 'pay between assignments' contracts to their temporary workers. Requirements of the TWAs are extensive and can be found in the full guidance.

Formal process for complaints

Under the regulations an agency worker can take the following action.

In relation to Day 1 entitlements, the agency worker should approach the hirer direct with a written request for information before making a claim. The hirer has 28 days to respond in writing from receipt of the request.

The hirer should provide a written statement with all relevant information relating to the rights of a comparable worker or employee and reasons for the treatment of the agency worker.

If the request is in relation to basic working and employment rights applicable after 12 week, the agency worker cannot request information until the 12 weeks have elapsed. In this instance the agency worker can request a **written statement from the Agency** about any aspect of equal treatment they do not believe they were receiving before making a claim.

If an agency worker has not received a written statement within 30 days of making that request, the agency worker can then write to the hirer requesting the same information.

Awards and Penalties

The agency worker can receive loss of earnings or a compensatory award dependent on the breach. The minimum award is two weeks' pay. There is no maximum award.

Where a Tribunal finds evidence of a breach by way of deliberate avoidance of accrual of the 12-week qualifying period and intent to prevent the worker from gaining equal treatment, the award can be up to £5,000 against the Hirer or Agent or split between the two.