

Briefing Note: New Rights for Agency Workers

An Introduction to the Briefing Note

New laws protecting agency workers come into force on 1 October 2011. This Briefing Note will help your business get up to speed with the new rights available to agency workers before the legislation is introduced. This briefing note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Briefing Note
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**For detailed advice on all
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Purpose of the Agency Worker Regulations 2010

The aim of the Regulations is to protect temporary workers from exploitation by ensuring that they enjoy the same basic employment conditions as if they were permanently employed by you.

Who is an agency worker?

An agency worker is any individual who:

- Is supplied by a temporary work agency (TWA) to work temporarily for and under the supervision and direction of your business; and
- Has a contract with the TWA, which is either:
 - a contract of employment with the TWA; or
 - any other contract [with the TWA](#) to perform work and services personally.

A TWA is an employment business that supplies workers to hirers for temporary work (as opposed to an employment agency, which finds permanent employment for individuals).

Day one rights

From 1 October 2011, from the start of their assignment, an agency worker will be entitled to:

- Access any collective facilities and amenities that other employees or workers within your business have access to, for example:
 - canteens;
 - child-care facilities; or
 - the provision of transport services (for example, transport between sites and parking).
- The same opportunity to apply for relevant vacancies as other employees or workers within your business.

The right to equal treatment

From 1 October 2011, an agency worker will be entitled to the same "basic working and employment conditions" that they would have been entitled to had they been directly recruited by your business. This entitlement will not apply until an agency worker has undertaken the same role (whether on one or more assignments) within your business for a 12-week qualifying period. Basic working and employment conditions relate to:

Briefing Note: New Rights for Agency Workers

- Pay (including basic pay, overtime pay, holiday pay, bonuses for individual performance and vouchers with a monetary value, such as childcare vouchers)
- Working time
- Night work
- Rest periods and breaks
- Contractual annual leave

A pregnant worker will also have the right to receive various enhanced entitlements, including paid time off for antenatal care.

How to calculate the qualifying period

The qualifying period starts on 1 October 2011 and accrues on a weekly basis, regardless of the hours the worker works in each week.

Continuity will be broken and an agency worker will have to start their 12-week qualifying period again when:

- They start a new substantively different role within your business (for example, moving from a production line role to an administrative role)
- There is a break of at least six calendar weeks between assignments that the agency worker undertakes within your business

Continuity will continue to accrue where a break is due to:

- Pregnancy, childbirth or maternity that take place during pregnancy and for up to 26 weeks after childbirth
- The agency worker taking maternity, paternity or adoption leave

Some periods away from work, whether between assignments or during an assignment, will merely suspend continuity (neither counting towards continuity nor breaking it), for example:

- Sickness absence of up to 28 weeks
- Annual leave
- Jury service of up to 28 weeks

A worker who changes agency during an assignment will continue to accrue service with your business.

Who is liable?

The TWA will be responsible for any breach in relation to an agency worker's right to equal treatment in terms of basic working and employment conditions to the extent that it is responsible for the infringement. However, it will have a defence if it can demonstrate that it took reasonable steps to obtain relevant information from you about your employees' basic working and employment conditions and, when it received such information, acted reasonably in determining the agency worker's entitlements for the assignment with you to ensure he or she received equal treatment.

Briefing Note: New Rights for Agency Workers

The means that if you fail to provide accurate information regarding the basic terms and working conditions enjoyed by your employees and this results in an agency worker being treated less favourably than a comparable worker or employee within your business you may be liable. An Employment Tribunal will apportion any compensation between you and the TWA in accordance with the degree to which it considers each party to be responsible for the agency worker receiving less favourable basic conditions of employment but in circumstances where the agency worker does not receive equal access to collective facilities and amenities, liability for compensation will rest solely with your business.

What are the penalties for breaching the new laws?

- If your business breaches its obligations under the new laws an employment tribunal can award potentially unlimited compensation, taking into account the agency worker's losses.
- A tribunal can also award compensation of up to £5,000 against your business if it decides you have attempted to structure an assignment in order to avoid the qualifying period.

Circumstances when the Regulations will not apply

The Regulations will not apply in circumstances where the agency worker is employed by the TWA under a permanent contract of employment which provides for the worker to be paid in between assignments. This exception is conditional upon the following:-

- The agency worker working under a permanent contract of employment with the TWA;
- The contract of employment having been entered into before the start of the agency worker's first assignment with your business and must contain a statement advising the agency worker that the effect of entering into the contract is that they will be giving up their right to equal treatment under the Regulations;
- The employment contract must contain written terms relating to the scale, rate or method of calculating remuneration, expectations as to the type of work to be undertaken by the agency worker and the hours that he or she may be required to work during any assignment;
- In periods in between assignments the TWA must take reasonable steps to seek suitable work for the agency worker and if a suitable assignment becomes available it must give them the option to be put forward for it;
- The TWA must also pay the agency worker at least 50% of their basic pay or minimum wage (whichever is the higher) when the worker is in between assignments; and
- The TWA must not terminate the agency workers employment contract until it has complied with its obligations to the worker in between assignments for no less than an aggregate period of 4 weeks during the term of the contract.

Given the considerable cost to the TWA of entering into such an arrangement with its agency workers, it may not be commercially viable for them to do so and if they do it is likely that the costs involved will be passed on the end user.

Briefing Note: New Rights for Agency Workers

Practical Steps to prepare your business for the Regulations

1. Review your existing staffing practices in relation to hiring temporary workers;
2. Inform yourself of the basic employment conditions of the agency workers currently working for you and compare these to the conditions of your own employees in comparable roles;
3. Open negotiations with the TWAs your business uses to determine how you will both deal with the impact of the Regulations;
4. Be prepared in advance of 1 October 2011 to provide TWAs with details of your basic conditions of employment;
5. Take practical steps to ensure staff facilities are accessible to agency workers for example, ensure that any temporary passes or key cards allow the same access to your canteen, gym or car park as if afforded to your permanent employees.

If you have any questions about the content of this Briefing Note, please contact Paul Maynard: pcm@gabyhardwicke.co.uk or on 01323 435900.

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