

Briefing Note: Rights of Agency Workers

Introduction

Laws for the protection of agency workers have now been in place since 2011. In April 2020 the Government intends to remove a significant loophole in the form of the Swedish Derogation, which could increase the number of claims brought under the legislation. This updated Briefing Note is aimed at those businesses who supply agency workers and those businesses who hire them. This Briefing Note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

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Purpose of the Agency Workers Regulations 2010

The Agency Workers Regulations 2010 (**AWR**) give effect to EU law in the guise of the Temporary Workers Directive. The purpose of the AWR is to protect temporary workers from exploitation by ensuring that they enjoy the same basic employment conditions as if they were permanently employed by the hirer.

Who is Covered by the AWR

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 the hirer; and who
- Has a contract with the TWA, which is either:
 - a contract of employment; or
 - any other contract to perform work and services personally

Only these agency workers who are genuinely self-employed, in business on their own account and who operate through a business to business contract are exempt from the definition. This exemption is likely to extend to those who provide their services through a personal service company, who manage themselves and have a genuine right to provide a substitute.

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). This would preclude the AWR from applying to agency workers who are permanently or indefinitely assigned to the same hirer but would capture many intermediaries who operate in the supply chain.

Day One Rights: access to facilities and vacancies

From the first day of their assignment, an agency worker is entitled to:

- Access any collective facilities and amenities that other employees or workers within the hirer's business (who do broadly similar work) have access to, for example:
 - canteens;

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- child-care facilities; or
- the provision of transport services (for example, transport between sites and car parking).
- The same opportunity to be informed of and apply for relevant vacancies that other employees or workers (doing broadly similar work) within the hirer's business, have.

Week 12 Rights; same basic working and employment conditions

After completion of a 12 week qualifying period, an agency worker is entitled to at least the same basic employment and working conditions that would ordinarily have been included in the contracts of employees or workers if they had been directly recruited by the hirer. The basic working and employment conditions covered by the week 12 rights are those relating to:

- Pay (including basic pay, overtime pay, shift or unsocial hours allowances, holiday pay, bonus or commission referable to individual performance and vouchers with a monetary value, such as childcare vouchers, but excluding occupational sick or maternity pay, redundancy or notice pay, pensions, expenses and most benefits in kind).
- Working time
- Night work
- Rest periods and breaks
- Annual leave

Deemed Compliance

The hirer and/or the TWA will be deemed to have complied with their week 12 obligations where the agency worker is working under the same relevant terms and conditions as a comparable employee and where such terms are ordinarily included in the hirer's employment contracts. A "comparable employee" is one working under the supervision and direction of the same hirer and engaged in the same, or broadly similar, work and, where relevant, with a similar level of qualification and skills, as the agency worker.

When assessing whether an agency worker has been offered the "same basic working and employment conditions", a Tribunal will compare the contracts term by term, rather than looking at the whole package of working conditions, meaning it is not possible for a hirer to compensate for a less favourable term by making another more favourable, for example, by giving increased holiday in exchange for a lower hourly rate.

Pregnancy and Maternity Protection

Pregnant women and nursing mothers enjoy certain additional protections after completing the 12 week qualifying period, as follows:-

- To be allowed paid time off to attend anti-natal medical appointments and classes.
- If they are unable to carry out duties for health and safety reasons, they should be found alternative sources of work at a no less favourable rate of pay.

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- If alternative work cannot be found, then they have the right to be paid by the TWA for the remainder of the expected duration of the original assignment.

How to Calculate the Qualifying Period

The qualifying period accrues on a weekly basis, regardless of the hours the worker works in each week.

The Clock Resets

Continuity will be broken and the 12-week qualifying period will start again when:

- An agency worker starts a new substantively different role within the hirer (for example, moving from a production line role to an administrative role) or
- There is a break of at least six calendar weeks between assignments with the same hirer

The Clock Pauses

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:

- Breaks of less than six calendar weeks between assignments with the same hirer
- Sickness absence of up to 28 weeks
- Annual leave
- Jury service of up to 28 weeks

The Clock Keeps Ticking

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

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

A worker who changes TWA during an assignment will continue to accrue qualifying service with the hirer, provided they remain in substantively the same role.

Who is Liable?

The hirer is solely responsible for any breach of the agency workers' Day One rights.

Both the hirer and the TWA are each responsible for any breaches of the agency workers' 12 week rights, to the extent that they are responsible for the infringement. Where both are responsible, compensation will be apportioned by an Employment Tribunal on a just and equitable basis. However, the TWA will have a defence if it can demonstrate that it took reasonable steps to obtain relevant information from the hirer and acted "reasonably" in determining the agency workers basic working and employment conditions. If the reasonable steps defence is made out, then the hirer will be fully responsible for any breach. Government

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guidance suggests that it is in the interests of both the hirer and the TWA to exchange information in a timely manner to avoid potential liability under the AWR.

Where an agency worker believes that either the hirer or a TWA may have infringed the right to equal treatment, they may make a request to the TWA for a written statement containing information relating to the treatment in question. The TWA must provide the statement within 28 days and the AWR sets out the categories of information that should go into the statement.

If the agency worker does not receive the statement within 30 days of making the request, they can then make a request to the hirer for a written statement of information on the basic working and employment conditions of its workers and the hirer must provide the statement within 28 days of receiving the request.

Where the complaint relates to the agency workers' Day One rights, the request for a written statement, may be made directly to the hirer who must then reply within 28 days.

An Employment Tribunal is entitled to draw adverse inferences against a party that fails to respond to such a request or provides an evasive or inadequate response.

What are the Available Remedies and Liabilities?

An agency worker has a variety of claims at its disposal in the event of a breach of the AWR including a right not to be dismissed or subjected to a detriment for making allegations or asserting rights or giving evidence under the AWR; and a right to equal treatment in respect of Day One and Week 12 rights.

Remedies are similar to those available in a discrimination claim. A Tribunal can make a declaration, order payment of compensation and make recommendations for action to be taken. Compensation is potentially unlimited and should reflect precisely the amount of the historic under payments. Additionally, compensation for injury to feelings can be awarded.

The Government has introduced specific anti-avoidance provisions which apply where the assignments have been structured in such a way to avoid the qualifying period applying, for example, where an agency worker has completed two or more assignments with the same hirer and the most likely explanation for the structure of the assignments is that they were intended to prevent the agency worker from being entitled to equal treatment. In such a case the structure will be deemed to be prohibited and, in such cases, Tribunals are able to make an additional award of up to £5,000.

The Swedish Derogation

Historically the AWR did 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 between assignments. This derogation 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 the hirer and it containing 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 AWR;

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- The employment contract containing 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;
- The TWA taking reasonable steps to seek suitable work for the agency worker between assignments and if a suitable assignment becomes available then giving them the option to be put forward for it;
- The TWA paying the agency worker at least 50% of their basic pay or the National Minimum Wage (whichever is the higher) when the worker is between assignments; and
- The TWA not terminating the agency worker's 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.

Many TWAs have utilised the Swedish Derogation to avoid the impact of Week 12 Rights under the AWR. The Agency Workers (Amended) Regulations 2019 formally repeal the Swedish Derogation on 6 April 2020. At that time many more agency workers will fall within the scope of the AWR and claims can be expected to increase significantly. By 30 April 2020 any TWA who had been relying upon the Swedish Derogation must provide its agency workers with a statement to the effect that the contractual provisions containing the Derogation no longer apply.

Practical Steps to ensure your business complies with the AWR

If you are a Temporary Work Agency

1. Put in place systems to ensure that the Hirer provides you with relevant information about basic working and employment conditions of comparable, directly recruited employees and the basis on which they consider them to be comparable.
2. Set up reminders to check with Hirers if there have been any changes to the relevant information.
3. Check with the Hirer whether the agency worker has previously worked for it through another TWA in order to accurately assess the qualifying period.
4. Ensure that you have included a contractual obligation in your terms of business with Hirers requiring the Hirer to provide the relevant information on an ongoing basis.
5. Where multiple TWAs are involved in the supply of an agency worker, ensure that the TWA with the direct contractual relationship with the Hirer requests the relevant information and distributes it to other TWAs in the chain.

If you are a Hirer

1. Undertake an audit of agency staff and their basic terms to see how they compare with equivalent employees/workers.
2. Provide TWAs with standard terms and conditions of employment, pay scales and annual leave entitlements of comparable employees/workers. There should be confidentiality provisions in the

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contract with the TWA and, where necessary, privacy notices under the Data Protection Act 2018 should be updated.

3. Establish a mechanism to keep track of agency workers so that the qualifying period can be calculated easily and correctly.
4. Consider if you can structure your hiring of agency workers to avoid the AWR applying but without breaching the anti-avoidance provisions.
5. If you had been relying upon TWAs to enter into contracts containing the Swedish Derogation, consider the impact upon the agency workers when the Derogation is repealed in April 2020.
6. To avoid the AWR altogether, consider setting up an in-house "bank" of directly recruited casual workers, use managed service companies for the delivery of certain services or increase the use of genuinely self-employed individuals or limited company contractors.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard paul.maynard@gabyhardwicke.co.uk

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