

## Checklist: New Rights for Agency Workers

**The purpose of the Agency Workers Regulations 2010 is to ensure that temporary workers taken on by your business through an agency will be treated in the same way as ordinary employees once they have worked for your business for 12 weeks or more. The rights came into force on 1st October 2011 and this checklist will help your business get up to speed with the new rights available to agency workers.**

### 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 to perform work and services personally for the TWA.

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

If you use an agency worker through a TWA, your business will be treated under the Regulations as a hirer.

### Exemptions to the Regulations

There are a variety of schemes which agencies are hoping to adopt so as to avoid the Regulations for example using umbrella organisations, and other third parties. These must be treated with extreme caution as the Regulations contain various anti-avoidance provisions.

There is, however, an arrangement called the Swedish derogation, which is allowed for by the Regulations which exempts an agency worker from the Regulations if the TWA employs them between assignments and complies with other specific requirements. Few agencies are expected to use this scheme.

### The right to equal treatment

#### Day one rights

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)
- The same opportunity to apply for relevant vacancies as other employees or workers within your business.

It will be your responsibility as hirer to ensure that this is done.

## Week 13 rights

An agency worker who has undertaken the same role (whether on one or more assignments) within your business for a 12 week qualifying period, will be entitled to the same "basic working and employment conditions" that they would have received had they been directly recruited by your business. Agency workers are therefore entitled to be treated in the same way in relation to pay, annual leave, working hours, night work and periods of rest during, and between, working days.

## Pensions, sick pay and maternity pay

There are also enhanced rights for agency workers who become pregnant. However, the right to basic working and employment conditions does not include a right to receive payments in respect of an occupational pension scheme, occupational sick pay or occupational maternity, paternity or adoption pay. While an agency worker will still be entitled to these statutory payments, (provided they satisfy the eligibility criteria for the payments) they are paid by the TWA although it is sensible to ensure that this is made clear in the agreement between the hirer and the TWA.

## How to calculate the qualifying period

The qualifying period starts on 1st 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 restart their 12 week qualifying period, in a number of ways. Generally a break of over 6 weeks will break continuity however, the Regulations have a number of anti-avoidance mechanisms to stop hirers and TWAs trying to break continuity and avoid the Regulations.

## Who is liable?

As a hirer, your business is solely responsible for providing day one rights.

Both you as hirer and the TWA are responsible for the week thirteen rights. It is the principal responsibility of the TWA to ask you as hirer to confirm what permanent staff undertaking the role would receive by way of pay and benefits, and to make sure that the agency worker is paid at the same level. As hirer you must ensure that you provide the TWA with the relevant information and ensure that you keep the TWA informed of any changes which affect pay and benefits of comparable permanent staff. If you do so, you as hirer have a defence to any claim by an agency worker for underpayment. However, if you do not, or you provide incorrect or misleading information, you as hirer will be in the firing line.

## What are the penalties for breaching the new law?

- If your business breaches its obligations under the new laws, an employment tribunal can award compensation, taking into account the agency worker's losses. The value of the award will be dictated by the shortfall but is otherwise unlimited.
- 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.

## Checklist

- Does your business use agency workers?
- Do you provide access for all agency staff to any collective facilities or amenities?
- How many agency workers have been working for your business for 12 weeks or more - do you have a method for monitoring this?
- For those agency staff who have worked for 12 weeks or more in the same or substantially the same roles within your business, are they receiving the same pay and other basic working and employment conditions as if you had recruited them yourselves?
- What steps do you take to keep the TWA informed of comparable salaries and benefits?
- What arrangements are in place with the TWA if the agency worker becomes sick or goes on maternity, paternity or adoption leave?
- If things go wrong, and the agency worker does not receive the pay and benefits that they should, what is the arrangement between you and the TWA about who deals with any claim?

## More Information

If you have any questions about the content of this checklist, please contact Jonathan Golden on [j.golden@goldenleaver.co.uk](mailto:j.golden@goldenleaver.co.uk) or on 020 3159 5171