

The Agency Workers Regulations 2010

Impact Assessment Guide

Version 2

Section 1

A Hirer's Guide

**Produced by the Association of Professional Staffing Companies
(APSCo)**

www.apSCO.org

Contents

The APSCo Impact Assessment Guide is made up of three sections, and these are available in three separate publications as listed below.

Publication	Document Title	Description	For Use By:
Section 1	A Hirer's Guide to the Agency Workers Regulations 2010	An introductory guide for end-user clients.	Hirers
Sections 1 & 2	A Hirer's Guide to the Agency Workers Regulations 2010 & AWR Risk Assessment Toolkit for Members	This includes the Hirer's Guide, for members' reference when undertaking the Risk Assessment	Members
Sections 1 & 3	A Hirer's Guide to the Agency Workers Regulations 2010 & AWR Impact Assessment Toolkit for Hirers	This includes the Hirer's Guide for reference when members assist their end-user clients in undertaking the Impact Assessment.	Hirers & Members

Before undertaking an Impact or Risk Assessment, we would strongly recommend that you read the information contained within Section 1.

This Impact Assessment Guide is for use by APSCo members only, and their clients. The facts, information, and opinions contained herein are correct to the best of APSCo's knowledge as at time of publication. However, this is intended as a concise, introductory guide to the new legislation, and not as a substitute for legal advice. The aim of this guide is to help members and their clients prepare for this legislation by providing an overview of the Agency Worker Regulations 2010 ("Regulations"), and to pinpoint some of the issues surrounding the impact and risks presented by it. This document is not an exhaustive and complete reference document for the Regulations. The Regulations can be downloaded at <http://www.legislation.gov.uk/uksi/2010/93/contents/made>.

UK Government guidance on the Regulations has now been published, and is available at <http://www.bis.gov.uk/policies/employment-matters/strategies/awd>. We understand that an amended version of the guidance will be issued towards the end of May, 2011.

This is a complex new legal area giving rise to a range of new rights for "Agency Workers". There will not be a "one size fits all" approach, and the risks and compliance requirements will vary by sector and type of supply arrangement. Members and their clients are therefore recommended to seek their own specialist legal advice on how the Regulations will affect their supply, use, and cost of agency workers.

APSCo can be contacted at info@apsco.org or on 08458 997388.

A Hirer's Guide to the Agency Workers Regulations 2010

APSCO has updated this guide, as at May 2011, to provide an overview to hirers of the impact the Agency Workers Regulations ("Regulations") will have on them if they engage the services of individuals supplied via a third party such as an employment business. This legislation comes into force in October 2011, so it is important to start looking at these issues now.

This document gives an overview of the Regulations, and more detailed guidance covering specific areas will be published over the coming months.

Hirers should be aware that this is new legislation, and as such its interpretation may change over time, and that the guidance included within this document reflects current thinking.

The Agency Worker Regulations

The main principle of this new legislation is to give equal treatment to those temporary workers defined by the Regulations as agency workers, in line with comparable permanent employees or directly recruited workers, with regard to pay and certain other working conditions after 12 weeks in an assignment.

Although there are some day one rights, to qualify for equal treatment with regard to basic working and employment conditions the agency worker must have been engaged by the hirer, in the same or similar position, for a period of 12 continuous calendar weeks (the "qualifying period"). There are circumstances in which this qualifying period is paused, or reset to zero, examples of which are explained in more detail within this document, but generally the qualifying period will accrue unless there is a break of more than 6 calendar weeks.

It is not the intention of this legislation to give preferential treatment to agency workers over and above that given to permanent employees or directly recruited workers. It is also important to note that the Regulations do not give agency workers employment status.

Terminology

"**hirer**" means a person or organisation to which individuals are supplied to work temporarily under that person's supervision and direction. An end-user client using an employment business, master vendor or other staffing company to supply temporary workers will be a hirer.

"**agency worker**" ("AW") means an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and who agrees to perform work and services personally for the temporary work agency. See later section on "**Individuals potentially outside the scope of the Regulations**".

"**temporary work agency**" ("TWA") means a person who supplies individuals to work temporarily for and under the supervision and direction of hirers, and who pays for, or receives or forwards payment for the services of such individuals. Note that a person or organisation does not need to be an employment business – other intermediaries such as umbrella companies and group companies supplying staff within a group may also be temporary work agencies.

Application of the Regulations

The Regulations apply to all **temporary workers who are supplied to work for and under the supervision and direction of a hirer**, and supply is made under a contract of employment or any other contract to perform work and services personally.

New Rights to which Agency Workers will be Entitled

From Day One of their Assignment

The agency worker will have certain entitlements from day one of their assignment. With effect from 1st October 2011 all agency workers will be entitled to:

- be informed by the hirer of relevant job vacancies within the hirer's organisation; and
- access to collective facilities and amenities, such as a canteen, childcare facilities, or transport services. This does not include access to off-site facilities or amenities, which are not provided by the hirer, such as subsidised access to an off-site gym as part of a benefit package to reward long-term service or loyalty, or other types of benefits such as the ability to purchase discounted goods in a staff shop, or subsidised canteen meals.

These entitlements will not be subject to a qualifying period, and must be available to the agency worker from the first day of their assignment. Access to such facilities can be refused if the client can make an objective justification for doing so. However, it should be noted that it is unlikely that hirers would be able to rely on cost alone to justify less favourable treatment to agency workers. No preferential access is implied by these rights, for instance, if there is a waiting list for childcare facilities, then the agency worker would be entitled to join the waiting list on the first day of their assignment, but must wait their turn for a place to become available.

Benefits such as season ticket loans, and childcare vouchers are not generally classed as amenities and are therefore not included in these day one entitlements. The difference between an amenity and an employment benefit will not always be clear cut, and if in doubt hirers should refer to UK Government guidance and future case law on this point.

Please note this is the only entitlement on which liability is completely clear – the liability for provision of an agency worker's day one rights, lies completely with the hirer.

After the Qualifying Period

Agency workers will be entitled to the same basic working and employment conditions as if they had been recruited directly by the hirer, which includes:

- pay being any sum payable to the worker, including any fee, commission, bonuses, overtime, shift allowances, payment for annual leave (over and above the statutory entitlement, please see "Annual Leave" below), and any other payments, which are directly attributable to the amount or quality of the work undertaken by the agency worker (See "What Pay Includes" below);
- The duration of working time, rest breaks, rest periods and night work; and
- Annual leave (over and above the statutory entitlement). Please note that agency workers have a separate entitlement to receive annual leave as if they were recruited directly by the hirer, which is separate and distinct from the payment for such leave, as included in the definition of "Pay". The Government has indicated that where the annual leave entitlement exceeds the statutory minimum (currently 28 days including public holidays) payment for the additional leave can be paid in lieu of the agency worker taking such leave. Equal treatment will, however, require agency workers to be given the same right and opportunity to take the full leave entitlement if they choose to do so. APSCO is urging all its members to ensure that they receive written agreement from an agency worker before making any holiday payment in lieu, due to this separate entitlement to annual leave.

What Pay Includes

- Basic pay (usually hourly/daily rate).
- Overtime payments.
- Shift/unsocial hours allowances, risk payments for hazardous duties.
- Payment for annual leave above the statutory may be paid in lieu (please see "Annual Leave" above).
- Bonus or commission payments directly attributable to the amount or quality of the work done by the agency worker. This can include payments linked to sales or production targets or personal performance. The key to whether a payment will be within the scope of pay is the criteria used to determine payment. If the criteria for the payment of a bonus are based on the quantity or quality of work done, then it will be within the definition of pay.
- Vouchers or stamps, which have a monetary value and are not salary sacrifice schemes – for example luncheon vouchers, or childcare vouchers.

Pregnant Workers and New Mothers

There are two new entitlements that agency workers will have after the 12 week qualifying period:

- Pregnant agency workers will be entitled to take paid time off for ante-natal medical appointments and classes whilst on assignment.
- If an agency worker is pregnant or a new mother, and they cannot continue to carry out the duties of their assignment due to health and safety reasons, they must be found suitable alternative work, paid at the same rate or higher. If no alternative work can be found for them, the TWA must continue to pay the agency worker for the duration or expected duration of the original assignment.
- This entitlement does not extend an agency workers maternity rights beyond those to which they would otherwise have been entitled.

Benefits not within Scope

It is not the intention of the new Regulations to change the employment status of agency workers, and their rights to equal treatment will not include all the benefits to which permanent employees are entitled.

What Pay Excludes

- Redundancy pay.
- Notice pay (statutory and contractual linked to loss of employment).
- Maternity, paternity or adoption leave pay (although note that agency workers may still be entitled to statutory maternity/paternity/adoption leave and pay).
- Occupational sick pay (although statutory sick pay may apply).
- Company pension schemes (although note that forthcoming pensions legislation will introduce new pension rights for agency workers).
- Payments or rewards linked to financial participation schemes.
- The majority of benefits in kind given as an incentive or reward for long-service.
- Bonus payments that are not directly attributable to the amount or quality of work done by an individual and which are given to encourage the individual's loyalty or to reward long-term service.
- Pay for time off for carrying out trade union duties.
- Guarantee payments (e.g. payable during a lay-off period).
- Any advance of pay or a loan.
- Any expense incurred in carrying out the employment.
- Additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice.
- Any payment to a worker other than in that person's capacity as a worker

Please note that unless the statutory right is expressly excluded under the Regulations any statutory entitlements currently available to agency workers will apply and remain unaffected by this new legislation, e.g. if an agency worker meets the relevant criteria they will be entitled to receive Statutory Sick Pay but any occupational sick pay over and above statutory will be excluded.

Hirers will need to identify which pay and benefits payable to a comparable person are within Pay for the purposes of the Regulations. They will then need to provide full details of the different pay elements to their recruitment firm, and determine whether a fee increase is required to equalise agency worker pay.

The Qualifying Period

An agency worker's services must have been engaged for a period of 12 continuous calendar weeks working in the same role with the same hirer before they have the right to equal treatment (with the exception of their day one rights explained above). The qualifying period is irrespective of whether an agency worker works full or part-time. For example an agency worker may only work one day a week, but they will still be entitled to equal treatment after 12 weeks on assignment.

A new qualifying period will begin when there is a break of more than six calendar weeks between assignments in the same role, or, where the agency worker takes on a new assignment with the same hirer, which is substantively different to their previous role.

A substantively different role will be one where the main work or duties are different from those required in the previous role, and where the agency worker has been informed in writing by the TWA of the type of work they will be required to do in the new role, e.g. if the role is at a different level of seniority or responsibility.

There are circumstances in which the qualifying period may be paused, and then restarted once the agency worker returns to the assignment. These include:

- A break of no more than six calendar weeks
- Sickness Absence
- Annual Leave
- Shutdowns – factory closures/school holidays
- Jury Service
- Industrial Action

Where the agency worker is absent from their assignment due to pregnancy, childbirth, or maternity related absence (during the period from the start of a pregnancy to 26 weeks after childbirth, or when the agency worker returns to work) or for statutory or contractual maternity, adoption, or paternity leave to which the agency worker is entitled the qualifying period will continue to accrue during the agency worker's absence for the original intended duration or likely duration of the assignment, whichever is the longer. This will also apply to maternity, paternity, and adoption leave where the agency worker has a contractual entitlement, whether statutory or otherwise to such leave.

Engaging agency workers on assignments of no more than 12 weeks, and replacing them with different agency workers is not expressly prohibited within the Regulations. It is possible that in some roles, where work efficiency is reached quickly, and continuity is not important, that this would be an option for a hirer. However, a hirer should

consider the cost implications of induction and lack of continuity before considering this model.

However, please be aware that there are specific anti-avoidance measures within the legislation for situations where the most likely explanation for the structure of more than two assignments carried out by an agency worker for the same hirer, or within the hirer's group is to deprive them of their rights under the Regulations.

Workers Outside the Scope of the Regulations

Individuals who work outside of the UK will not fall within the scope of the Regulations. Each EU member country must have implemented the EU Agency Workers Directive by the 5th December, 2011, so if individuals are working in other EU countries legislation in that country will apply.

Not all individuals working through TWA's will fall within scope. The **genuinely self-employed** (in business on their own account), and those working under the supervision and direction of the **supplier** rather than the hirer will not fall within scope.

Although **limited company contractors** are not expressly excluded, the definition of agency worker excludes arrangements where the contract the individual has with the temporary work agency has the effect that the status of the TWA and/or the hirer is that of a client or customer of the limited company or self-employed contractor.

Although the Regulations do not affect tax law and tax status the tests used to assess whether an individual is genuinely self-employed are similar. It is likely, therefore, that limited company contractors working outside IR35 will not be within the scope of the Regulations.

Managed service arrangements, whilst not expressly excluded, will fall outside scope unless, in reality, the hirer rather than the management service provider supervises and directs the staff. Simply placing a supplier representative on a hirer's site will not be enough to turn the supply into a managed service – contractual and actual responsibility for supervising and directing the staff must be with the service provider and not the hirer.

So Who is Likely to be Outside Scope?

A simplified answer to this question, based on the majority of individuals likely to be supplied by APSCo members is:

Limited Company Contractors, who are outside IR35.

Umbrella company workers will fall within scope unless they clearly do not work under the supervision and direction of the hirer. They may, however be taken out of scope for the purposes of equal Pay if they are employed by the umbrella company in accordance with Regulation 10 of the Regulations – "Permanent contracts providing for pay between assignments" - often referred to as the "Swedish Derogation" or the "Pay Between Assignments" model.

What is the Pay Between Assignments Model?

Where an agency worker is employed under a permanent contract of employment with a TWA (including any intermediaries, such as an umbrella company) and the conditions set out in Regulations 10 and 11 are met, the agency worker will fall outside the scope of the Regulations in relation to their rights for equal Pay.

These conditions include, but are not limited to the requirement that during any period during which the worker is not working, but is available to do so the employing TWA must take reasonable steps to seek suitable work for the worker, and pay the worker a minimum amount in respect of that period. The minimum amount is 50% of basic pay paid to the agency worker based on the highest level of pay paid within the 12 weeks immediately preceding the end of the previous assignment or during the assignment if less than 12 weeks. This payment must not be less than the National Minimum Wage.

The temporary work agency may not terminate a contract of employment with an agency worker until it has complied with the conditions stated in the paragraph above for an aggregate of not less than four calendar weeks during the contract.

For a complete list of the conditions, which must be met under Regulations 10 and 11 please see the Regulations, which can be downloaded at <http://www.legislation.gov.uk/uksi/2010/93/contents/made>.

The worker's entitlement to equality in terms of annual leave, the duration of working time, rest periods, rest breaks, and night work, still apply. This derogation will also not affect a workers' entitlement to day one rights (please see "From Day One of their Assignment" above).

The Regulations are vague in terms of what will constitute a compliant Pay Between Assignments contract of employment, and UK Government guidance is also ambiguous in some areas. Hirers and TWA's are recommended to seek specialist legal advice when drawing up PBA contracts. Hirers and their recruitment firms will also need to consider how the employing temporary work agency will fund payments between assignments.

Establishing a Comparator

An agency worker is entitled to the same basic working and employment conditions as they would be entitled to for doing the same job had they been recruited directly by the hirer – this is referred to as the "as if" test.

- The "as if" test requires the hirer to confirm what terms and conditions the worker would have been entitled to had they engaged them directly – there is no absolute requirement for the hirer or an agency worker to identify a comparable employee.
- However, the "as if" test will be deemed to have been complied with where the agency worker is working under the same relevant terms and conditions as an employee doing the same or broadly similar work (having regard, where relevant to whether they have a similar level of qualification and skills), and who is working or based at the same establishment as the agency worker.
- In summary, the hirer may wish to identify a comparable employee to identify what the relevant terms and conditions should be, and would need to identify a comparable employee in the event of an alleged breach.

- When identifying a comparable employee, if there is no comparable employee working at the same establishment then the comparison should be extended across different establishments.
- Terms of established pay scales, collective agreements, national agreements and established custom or practice can be used to provide comparator information.
- In most cases a hirer will be able to apply the "as if" test, but there will be some situations in which a hirer will be able to justifiably say that they would never take a worker on direct to do that type of work. If there is no comparable employee, the position is considered unique, however, the relevant terms and conditions standard to that work place should still be applied.

Where agency workers are paid more than comparable employees, no action needs to be taken with regard to Pay. However, the agency worker will still be entitled to other equal treatment, such as comparable annual leave (see **New Rights to Which Agency Workers will be Entitled**, above).

It is essential, when making a comparison between a worker's pay and a comparable employee's pay, to compare the basic pro-rata hourly/daily rate with the complete pay package of the comparable employee, including any performance-related bonuses that the employee is eligible to receive. It is possible that a worker may on the face of it appear to be paid more than a comparable employee, because their hourly rate is higher, however, when other elements (included within the definition of pay) of the employee's pay package are taken into account, the worker's pay is equal to or less than the comparable employee. Therefore, each element of Pay will need to be separately identified and quantified.

Potential Liability of the Temporary Work Agency and the Hirer

This is a complex issue and one that will become clearer only once the employment tribunals start to consider liability for breach of these Regulations. The temporary work agency will initially be liable for a breach in the provision of equal treatment, however, the Regulations, and UK Government guidance are clear that all parties in the supply chain, including the hirer and all TWA's will be liable for a breach to the extent that they are responsible for that breach.

Where a temporary worker agency can show that:

- it acted reasonably in obtaining or trying to obtain the required information from the hirer, or the temporary work agency in the next tier up the supply chain; and
- it acted reasonably on information received from the hirer, or other temporary work agency to determine equal treatment; and,
- based on the information received, it extended the same basic working and employment conditions to the agency worker,

but, nevertheless an employment tribunal concludes that the agency worker has not received equal treatment, then it is possible that the temporary work agency will not be liable for a breach.

The Regulations make it clear that where more than one temporary work agency is party to a claim the employment tribunal will have regard to the extent to which each temporary work agency will be responsible for the breach. This is an important point in relation to the types of supplies made by APSCo members because supply claims often include an umbrella company, an employment business, and a master vendor. Dependent upon the facts all three suppliers could potentially share liability for breach of the Regulations.

In certain cases the hirer may be liable, particularly if they have refused to provide accurate comparator information.

The hirer and all TWA's should not assume that responsibility for providing equal treatment will fall to the TWA at the bottom of the supply chain that actually pays the agency worker. This is not necessarily the case.

It should also be noted that liability in relation to an agency worker's access to collective facilities and amenities will be the hirer's.

This highlights the absolute importance of the flow of information between hirers and temporary work agencies particularly in situations, such as master vendor arrangements, where there are more than two parties in the chain.

It will be essential for each TWA to fully understand your pay and benefits structure, in what circumstances these are made available, and how/when comparable employees are appraised. We would hope that your recruitment firm already has a thorough understanding of your business culture and needs, but the new Regulations will mean that this relationship will be vital in ensuring compliance.

If you work closely with your employment business complaints from agency workers should be dealt with quickly, reasonably, and to the satisfaction of all parties. Note that as a hirer, unless you deal with the TWA that actually engages and pays the agency worker, you will need to ensure through your contracts that the comparator information and equalising payments are passed down the supply chain to the TWA that actually pays the agency worker. Ultimately information flows will be a matter of contract and so hirers and recruitment firms will need to revisit and update their supply terms to address the Regulations.

APSCo will be updating its model terms in respect to the Regulations, which will be available to all APSCo members before October 2011.

In the event that an agency worker presents a complaint to an employment tribunal, and it is upheld, please be aware of the following.

Employment Tribunals will have the power to

- make a declaration as to the rights of the agency worker and recommend action to be taken;
- order compensation of not less than two weeks' pay to be paid. Such compensation may be split between parties dependent upon their responsibility for the infringement;
- order additional compensation of no more than £5,000 where measures were taken to prevent the agency worker from being entitled to equal treatment by structuring assignment patterns in order to avoid the qualifying period;
- join all temporary work agencies and the hirer to the claim.

What should you do next?

Firstly we would recommend that you undertake an impact assessment to fully understand how the Regulations will affect the use of temps, contractors and other non-directly engaged individuals working for your organisation. For larger companies this may be a complex and time-consuming exercise with which you may require help from your recruitment firm.

To help you with this, APSCo has produced an **Impact Assessment Toolkit**, which provides information and advice on how to assess which temporary resource will fall within the scope of the Regulations.

APSCo is providing its members with on-going guidance on the AWR in the following areas:

- Keeping them up to date on any developments or updates regarding UK Government guidance.
- Providing guidance on implementation strategies.

We are providing documents to facilitate:

- Impact assessments in partnership with hirers.
- Initial risk assessments for recruitment firms.
- Risk matrix & example risk assessment.
- A list of factors to consider when determining a worker's employment status.
- New model contractual terms.

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