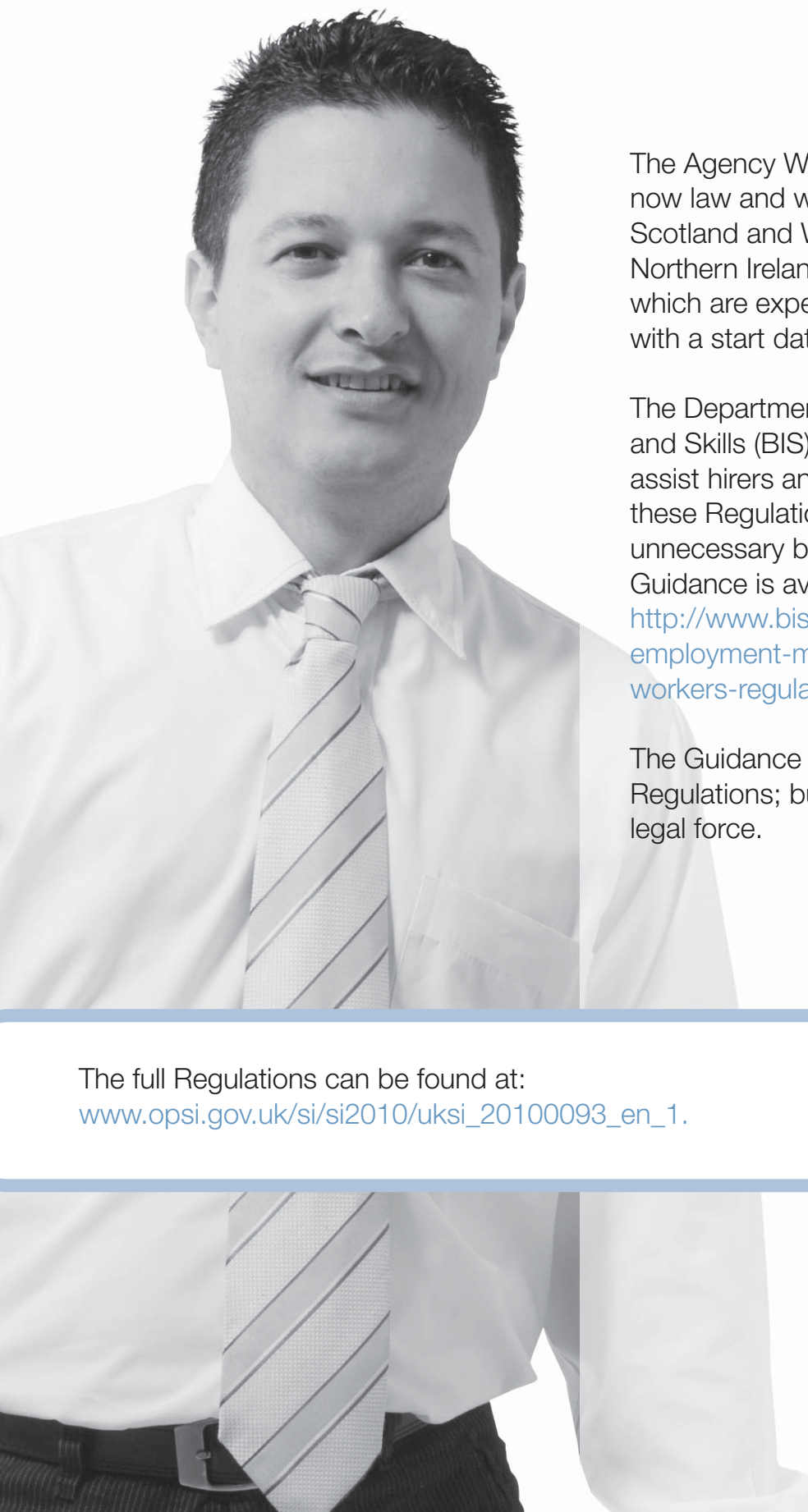


The Agency Workers Regulations

A Manpower Summary

Latest News - Updated 6 May 2011



The Agency Workers Regulations 2010 are now law and will be implemented in England, Scotland and Wales on 1 October 2011. Northern Ireland will have separate Regulations which are expected to be broadly similar but with a start date of December 2011.

The Department for Business, Innovation and Skills (BIS) has just issued Guidance to assist hirers and agencies in implementing these Regulations correctly but with as little unnecessary bureaucracy as possible. The Guidance is available at the following link: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/A/11-905-agency-workers-regulations-guidance.pdf>

The Guidance is intended to clarify the Regulations; but it is the Regulations that have legal force.

The full Regulations can be found at:
www.opsi.gov.uk/si/si2010/uksi_20100093_en_1.



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New Agency Worker Regulations and Guidance

'Basic working and employment conditions' – what is covered?

Equal treatment will cover 'basic working and employment conditions' defined as working time, over-time, breaks, rest periods, night work, holidays, public holidays and pay.

Pay

BIS indicate that equal treatment should mean 'pay for work done' which covers the contribution of the agency worker whilst on assignment, but leaves out those incentives and rewards that reflect the longer term relationship with a permanent employee. The definition of 'pay' in the Regulations covers basic pay, and 'fee, bonus, commission, holiday pay or other emolument'. The Regulations also contain a list of exclusions including occupational sick pay, company pensions and redundancy pay. Financial participation schemes are also excluded - defined as the distribution of shares, share options and profit share.

Bonuses relating to the quantity or quality of work done by the worker are to be included in pay but the Regulations do not require integration of agency workers into performance appraisal systems for someone directly recruited. The Guidance gives helpful detail in respect of bonuses, stating (page 28):

Bonuses linked to individual performance
There are many different types of bonus or commission payments. The key question is whether the bonus or incentive payment or reward is directly attributable to the amount and quality of work done. If it is for another reason other than the amount or quality of the work, such as to encourage the worker's loyalty or to reward long-term service then it is outside the scope of the entitlement to the same terms and conditions relating to pay.

Examples of bonus payments that would be included;

- *Commission payments linked to sales*
- *Bonuses payable to all staff who meet a specific individual performance target, e.g. in terms of calls handled in a given time*
- *Bonuses payable on the basis of individual performance over a given period, e.g. a reporting year.*

Examples of bonus payments which would be excluded;

- *Bonuses which are determined by the overall performance of the organisation and given to workers who have been with the hirer for a number of years (and are not based on their individual performance)*

- *Bonuses which are determined by the overall performance of the part of the organisation where the agency worker has worked, where there is no recognition of individual contribution*
- *Bonuses designed to reward loyalty and service to the organisation and not based on individual performance.*

Even where an agency worker does qualify for the bonus, they will not have to receive exactly the same bonus as any particular directly-recruited worker but should have the same opportunity to achieve a bonus, subject to their personal performance.

Where a bonus payment to a direct recruit would reflect performance and time served (so if someone directly recruited and present for only six months of a reporting year would have received 50% of a bonus), that would also be the case for an agency worker.

Benefits in kind are generally excluded with the exemption of a voucher or stamp which are included where they have a fixed monetary value and could be exchanged for money, goods or services e.g. luncheon vouchers or in certain circumstances childcare vouchers. This is not the case however where there are salary sacrifice arrangements.

Holidays

Agency workers will be entitled to the same rest time and leave as permanent workers after 12 weeks. Holiday pay above the statutory minimum is included but can be rolled up into a payment in lieu or as part of the hourly or daily rate. On this point the Guidance states (page 33):

Payment in lieu option

There will be many differing entitlements to paid holiday leave provided by hirers and a possible way of simplifying the administration of this situation could be to 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. Such arrangements would only relate to additional, contractual leave which is in excess of the statutory minimum.

12 Week Qualifying Period For Equal Treatment

The Qualifying period is 12 calendar weeks irrespective of working pattern e.g. full-time or part-time hours, after which an agency worker is entitled to equal treatment. The Guidance clarifies that the qualifying week commences on the same day as the assignment, e.g. it could run from Tuesday to Monday.

The Regulations also clearly state that any time spent in an assignment before 1 October 2011 does not count towards this qualifying period. Under Regulation 7, the clock for the qualifying period will only start again in a new assignment with the same employer after a 6 week ‘cooling off’ period or where there is a new assignment and the work or duties that make up ‘the whole or the main part of that new role are substantively different’. The Guidance has a helpful table showing when the clock on the qualifying period starts, stops and pauses. See below (pages 19-20):

In summary

Type of absence that affects the 12 week qualifying period	Effect on 12 week qualifying period
Agency worker begins a new assignment with a new hirer	Clock resets
Agency worker remains with the same hirer but is no longer in the same role	Clock resets
Break between assignments of 6 weeks or more (which is not one which ‘pauses’ the clock or during which it continues to tick)	Clock resets
Any reason where the break is less than 6 weeks	Pauses the clock
Sickness absence	Pauses the clock for up to 28 weeks
Annual leave	Pauses the clock
Shut downs – e.g. factory closure, school holidays	Pauses the clock
Jury service	Pauses the clock for up to 28 weeks
Industrial action	Pauses the clock
Pregnancy and maternity-related absence	Clock keeps ticking *
Statutory maternity, paternity or adoption leave	Clock keeps ticking **

* The protected period for a pregnant agency worker begins at the start of the pregnancy and ends 26 weeks after childbirth (or earlier if she returns to work)

**Where an agency worker has a contract of employment with an agency and is entitled to this type of leave

On Establishing Equal Treatment

In terms of establishing parity, the Regulations adopt an ‘as if’ test so that agency workers are treated ‘as if’ they were a direct recruit in terms of pay and employment conditions, ‘ordinarily included’ in contracts. The worker’s qualifications, experience and level of expertise can be taken into account as with a direct recruit. The direct recruit can be a ‘worker’ as well as a permanent employee, for the ‘as if’ test although this does not mean another agency worker.

To establish equal treatment, employers should look at employment conditions which apply generally in the workplace, such as pay scales, standard contracts and collective agreements. The Government has also made clear that equal treatment covers any

variations in the relevant terms and conditions made any time after the qualifying period has commenced, for example a company annual pay award. Where pay scales exist, the agency worker can be placed on the appropriate scale - if a permanent worker starts at the bottom of a pay scale then so too could an agency worker.

The Government has also maintained the “deeming” provision. That is if the hirer chooses to identify a ‘flesh and blood’ comparator who is a permanent employee (not a worker), and the agency worker receives treatment consistent with that comparator then the equal treatment provision is deemed to have been complied with. The comparator could be doing ‘the same or broadly similar’ work, either in the same establishment or if no such person exists, in a ‘different’ establishment according to the Regulations. This is intended to make it easier for a hirer to have a defence to prove that equal treatment is being provided.



BIS retains illustrative examples for reference in order to assist with the 'as if' test. The Guidance contains the following (pages 25-26):

Illustrative examples

Where a hirer has pay scales or pay structures

A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience. However the agency worker is paid at the bottom of the pay scale. Is this equal treatment?

Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then that is the entitlement.

Starter grades which apply primarily, or exclusively, to agency workers may not be compliant if not applied generally to direct recruits.

Where there are no pay structures

A hirer has decided to increase its workforce on a particular shift with agency workers. There are 10 permanent staff and 3 agency workers, doing the same work. The permanent employees are paid between £8-10 per hour—those recruited most recently being paid £8 per hour, the higher rate reflecting on the job experience. The work involves no specialist skills and only minimal on-job training. The agency workers are recruited at a rate of £6 per hour and continue to be paid at that rate after 12 weeks. Is this allowed?

No; there is clearly a rate of at least £8 for the job and the agency workers would be entitled to at least this after 12 weeks on the assignment.

Where there are no pay scales or structures or comparable permanent employees

A company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12 week qualifying period. Is this allowed?

Yes; there are no pay scales or collective agreements, or a 'going rate', so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However if, say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public holidays, the agency worker should be entitled to the same treatment on these points.

All directly recruited terms individually negotiated

A sales company pays its 10-person sales force at different rates. The rates vary considerably and all depend on individual negotiation. There is no going rate. An agency worker is paid at the same rate before and after the qualifying period. Is this equal treatment?

Yes; if all rates really are individually negotiated and there is no established custom and practice as regards pay – which the hirer and agency would need to be very clear was the case. But, as in the previous example, if there is a clear company policy on, for instance, annual leave, the agency worker would be entitled to equal treatment in that respect.

Equal treatment on pay for agency workers who work through umbrella companies

Where an agency worker works through an umbrella, the pay they receive should be the same as if they had been recruited directly – or paid to comparator. However, this does not mean the agency worker has to be paid more than they would have received if recruited directly. Where an umbrella worker receives part of their pay as reimbursement for travel expenses and, for example, where a directly recruited worker or employee would receive £100 per day, the umbrella worker must still receive £100 a day but this can be made up of £80 plus £20 reimbursement of travel expenses.



Access to Collective Facilities and Amenities

Agency workers will also have the right to equal treatment to collective facilities and amenities as a comparable worker, from day one. This is a right for which hirers are responsible and includes canteen, creche or transport services, i.e. local pick-up service, transport between sites but not season ticket loans or car allowances, food and drinks machine, toilet/shower facilities, mother and baby room and a prayer room. Hirers do have the right to 'an objective justification' test if they do not provide totally equal access, for example if there is a waiting list. The Guidance includes a helpful explanation for what is not covered (page 14):

Access to facilities is not:

This does not mean that agency workers will be given 'enhanced' access rights, for example, where membership to a crèche involves joining a waiting list, the agency workers would also be able to join the list and would not be given an automatic right to have a crèche place.

Nor is it about access to off-site facilities and 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 to other types of benefits such as the ability to purchase discounted company goods in a staff shop or subsidised meals in a canteen. However, this does not prevent hirers offering these to agency workers if they choose to do so.

Vacancies

The right to be informed about vacancies has been a major issue. The Regulations state that the agency worker will have 'the right to be informed by the hirer of any relevant vacant posts with the hirer' by general announcement in a suitable place in the hirer's establishment. However, the Guidance makes it clear that the right of agency workers to be informed of vacancies does not apply in the case of a genuine headcount freeze. It states (page 15):

Access to vacancies is not:

This obligation does not constrain employers' freedom regarding;

- *Any qualification or experience requirements such as time in service with the organisation*
- *How they treat applications.*
- *This right will not apply in the context of a genuine 'headcount freeze' where posts are ring fenced for redeployment purposes or internal moves which are a matter of restructuring and redeploying existing internal staff in order to prevent a redundancy situation.*

Pay Between Assignments or 'Derogation Contracts'

The Regulations allow an opt out from equal treatment on pay for those agency workers on a permanent contract of employment that are paid between assignments. Other employment conditions are still covered including holidays, and the agency worker must be informed that they are signing a contract which removes them from the equal treatment provisions for pay.

The 'derogation contract' will agree terms and conditions at the outset including:

- Minimum pay rates, locations, minimum and maximum hours, type of work
- 'On the bench' pay between assignments – at least 50% of 'on assignment' pay with a floor of the NMW
- That the agency takes reasonable steps to find work between assignments
- At the end of a 'derogation contract' the worker must receive over the course of the contract an aggregate of 4 weeks 'on the bench' payment to compensate for loss of equal rights, unless the worker resigns from the contract.

Other derogations in the Agency Workers Directive – collective and workplace agreements - have been removed from the final Regulations.

The Guidance makes it clear that the pay between assignments cannot be avoided by simply paying the minimum of an hour. It also clarifies that there is no pay between assignments in the same week. The Guidance states (page 38):

'The pay between assignments derogation does not apply to periods between two short assignments in any one week...'

It should be noted that any attempt to use this pay between assignments derogation under Regulation 10 for a different purpose to that envisaged by article 5(2) of the Directive (which allows a derogation as to pay, in the context of a worker who has the comfort of employed status and enjoys the certainty of a fair level of pay where there is genuinely no assignment available), is likely to be found to be unlawful.

In that situation any such contracts are likely to be unenforceable. In particular, a situation where one or more TWA and their hirer clients seek to use contracts for the purpose of interspersing periods of assignment with short working weeks – perhaps including as little as one hour's work only – in arrangements where there may not be any actual



period of pay between assignments, do not comply with the purpose of Regulation 10 and are very unlikely to comply with the requirements of the Directive.

Pay between assignments – when it does and does not apply

The pay between assignments derogation does not apply to periods between two short assignments which fall within the same week...

Payment between assignments must be at least 4 weeks of pay before the contract is terminated. If the contract is still running and the agency worker is between assignments then the pay must continue to maintain the contract. Clearly this may exceed the 4 weeks minimum.

Anti avoidance measures

The Regulations refer to contracts of greater than 'one hour' per week in order to demonstrate that providing a 'zero hours' contract (which may not provide a sufficient amount of mutuality of obligation, required in an employer/employee relationship) will not meet the requirements of the derogation from the right equal treatment as to pay under Regulations 10 and 11.

The pay between assignments derogation is designed to be used where an agency worker has a contract of employment with a TWA and is paid during the weeks when the worker is not assigned to a hirer. It is because of this pay, when the worker is not assigned, that the Regulations provide for the derogation from equal treatment on pay (as if recruited by the hirer or based on a comparable employee). TWAs and hirers should not structure arrangements in a way that deprives agency workers of the protection provided by pay between assignments. This could put them at risk of a legal challenge.

Anti-avoidance measures

Regulation 9 on 'Structure of Assignments' is an anti-avoidance measure. Where a pattern develops in the third or more assignment which suggests an avoidance structure, the agency worker would have grounds for taking a case to tribunal with a punitive award of up to £5000; e.g. a series of 11 week assignments in supposedly 'substantively different' positions in the hirer. The Regulation only applies where the most likely explanation for a structure of assignments is the 'intent' to prevent the agency worker receiving equal treatment.

However, the Guidance also makes it very clear that it is acceptable for a hirer to deliberately choose to only have assignments of 11 weeks or less. The Guidance states (page 23):

12 week assignments and anti-avoidance provisions

A hirer can obviously decide not to engage agency workers beyond the 12 week qualifying period and there is nothing in the Regulations to prevent an agency worker being released after 11 weeks or for assignments of 11 weeks to be the usual practice of any hirer. However, hirers and TWAs should be aware of anti-avoidance provisions which address any situation where a pattern of assignments emerge that are designed to deliberately deprive an agency worker of their entitlements.

Liability

Liability lies primarily with the agency unless they can prove they have taken 'reasonable steps' and in those circumstances can pass to the hirer. Also, for day one rights on access to vacancies and collective facilities, that liability is solely with the hirer.

Temp to Perm fees

BIS has agreed there is no need to make alterations to the Conduct Regulations on charging of temp to perm fees.

For further information please send an email to: enquiries@manpower.co.uk