



The UK Agency Workers Regulations 2010

The United Kingdom Agency Workers Regulations 2010 (the “Regulations”) will come into force on 1 October 2011 and all employers who use temporary agency workers should be aware of their implications. The key requirements of the Regulations are that after a 12-week qualifying period, all agency workers must receive basic working and employment conditions that are no less favourable than comparable employees of the end user, they must be given information about permanent roles and the end user could be subject to penalties for non-compliance or avoidance.

The Regulations will apply to agency workers (also known as temporary workers or “temps”) who are employed by a temporary work agency and are supplied to work temporarily for, and under the supervision of, an end user. The definition of agency worker includes employees who are employed by an employment business or agency to work for an end user and individuals employed under an umbrella company arrangement and who provide services to the end user client through the company. The definition of agency worker does not include workers employed under a managed service contract or to the genuinely self-employed. The Regulations will also not cover agency workers who do not have a contract of employment with the temporary work agency but have a contract with the agency to provide services directly to the end user. It remains to be seen whether this apparent loophole is addressed by an amendment to the Regulations or the tribunals taking a purposive approach to the scope of the Regulations.

Agency Workers’ Rights

Agency workers will have certain rights from day one and further rights that accrue after completion of the 12-week qualifying period.

From the start of an agency worker’s assignment, the worker will be entitled to access any shared facilities and amenities that comparable employees or workers can access, such as a gym, canteen, crèche, staff common room and car park. The agency worker will also be entitled to be told about any relevant vacancies at the end user, in order to be given the same opportunity as a comparable employee or worker to apply for permanent employment.

Once the 12-week qualifying period has been completed, an agency worker will be entitled to the same basic terms and employment rights as any comparative employee at the end user. Basic terms include pay, length of working time, rest

periods, rest breaks and annual leave. The concept of pay includes basic pay, overtime pay, shift allowances, holiday pay, vouchers, and bonuses reflecting the worker's personal contribution. Pay-related rights that are legitimately linked to long-term rewards are not included. Therefore, the Regulations do not cover contractual notice pay, contractual redundancy pay, entitlements to participate in share schemes, discretionary bonuses, or benefits in kind.

In addition, subject to the 12-week qualifying period, the Regulations give pregnant agency workers the right to take reasonable paid time off for ante-natal care. The agency worker has to inform the end user and the agency that she is pregnant, in writing if requested. The agency worker may also be required to provide written evidence of ante-natal appointments. The agency worker will be entitled to be paid during her absence and can bring a tribunal claim if she is unreasonably refused time off or is not paid during her absence.

Calculating the 12-Week Qualifying Period

As the Regulations are not retrospective, the 12-week qualifying period accrues from 1 October 2011 on a weekly basis. Any week during the whole or part of which an agency worker is engaged on an assignment is counted as a calendar week. So if an agency worker starts work on Wednesday 5 October, that will count as the first week. Given the irregular hours worked by many agency workers, the Regulations have been drafted to provide that the weeks worked do not need to be consecutive (unless there is a break of at least six weeks between assignments with the same end user). Continuity will not be broken, but the weeks will not count, where the gap consists of a break for any reason that is no more than six calendar weeks, a break of up to 28 weeks due to sickness, injury or jury service, where the agency worker takes an entitlement to leave, or where there is a planned shutdown or industrial action.

Continuity will be broken and the 12-week qualifying period will be reset to zero where the agency worker starts a new assignment with a new end user, where the agency worker remains with the same end user but starts a new, substantively different role or where there is a break of more than six weeks between assignments with the same end user.

By way of example, the Government's guidance on the Regulations indicates that where an agency worker works for an end user for six weeks with one agency and then, three weeks later, is placed with the end user for another eight weeks by a different agency, as there has not been a break of more than six weeks, the period of continuity will not be broken.

Anti-avoidance Provisions

The Regulations include anti-avoidance provisions which are intended to prevent end users and/or agencies deliberately structuring assignments so as to avoid workers obtaining the right to equal treatment. As a result, agency workers will be treated as if they were entitled to the 12-week entitlements if a structure of assignments develops, either by the end user or the agency, which is intended to prevent the worker from acquiring equal rights. If the most likely explanation for the structuring of assignments is an intention to prevent the agency worker being entitled to the right to equal treatment under the Regulations, tribunals will have the power to make an award of up to £5,000. It is important to note that there is no restriction on releasing an agency worker immediately before the 12-week qualifying period is met, but if this develops into a pattern, particularly if there are six-week gaps between assignments, there is a risk that it will be found to be a breach of the Regulations.

Employers who regularly use the services of agency workers should review these relationships prior to 1 October 2011 and carefully consider the hiring and release of such workers once the Regulations come into force.

If you have any questions regarding this update, please contact Nicholas Turner at nturner@sidley.com or the Sidley lawyer with whom you usually work.

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