

Agent of Change

Employers need to plan now and put in place job descriptions and pay structures to meet the demands of the new Agency Workers' Regulations, which come into force at the beginning of October, warns **Michael Delaney**.



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Many businesses have survived the recession through the use of temporary agency workers (temps) who have traditionally enjoyed less favourable statutory employment rights compared to employees. The use of temps may have given businesses a competitive edge during difficult trading periods and to meet peaks in demand, with the added bonus that comes from the ability to lay off temps during quiet periods. Many temps have also used agency working as a route to long-term employment by hirers.

The Agency Workers' Regulations 2010 were laid before Parliament on 21 January 2010 and will come into force on 1 October 2011. The Regulations will give temps the right to equal treatment to basic terms and conditions after 12 weeks of continuous service in the same role. No official

guidance has yet been issued and is long awaited. The Regulations will bring added cost to business, and are likely to raise issues between the temporary work agency and the hirer as to which party will pay the increased costs payable to the temps.

Hirers need to plan ahead and put in place proper job descriptions and pay structures, carefully defining roles within organisations. Temporary work agencies will also require from their hirer clients details of the workforce structure as they too could face claims by aggrieved temps for breaches of the Regulations.

Who will be protected?

The Regulations will apply to all temps who find temporary work through a temporary work agency. Temps contracted through umbrella-type organisations will be deemed intermediaries and such

arrangements will also be caught by the Regulations.

The Regulations will not apply to the self-employed, those who are employed through their own limited service company, workers engaged directly by the hirer, or on managed service contracts where there is no hirer supervision. The latter will mainly consist of outsourcing situations.

Equally, temps who have permanent contracts of employment with an employment agency who are guaranteed a number of hours per month and pay during a break between assignments will not be subject to the Regulations. This is referred to as the so-called 'Swedish derogation'.

Any contract meeting the Swedish derogation between the temp and the agency will have to meet certain



/ nursery to temps or indeed car parking facilities or season ticket loans.

Furthermore, hirers will also not wish to incur the expense of training workers who are only engaged under a temporary basis.

The 12 week qualifying period

To qualify for the right to equal treatment, an agency worker must have undertaken the 'same role', whether on one or more assignments, for the same hirer for at least 12 calendar weeks.

It is also worth remembering that any week during which the whole or part of a week which the agency worker is engaged on an assignment will be counted towards a calendar week.

requirements as to the minimum periods of notice and basic pay. Further guidance is awaited. There is likely to be litigation arising if such arrangements are held to amount to a sham and with the intention of avoiding the Regulations.

Indeed, the definition of a temporary work agency is very widely defined as an organisation and business that supplies individuals to work temporarily for and under the supervision of hirers or, alternatively, pays or receives or forwards payment for the services of individuals who are supplied to work temporarily under the supervision of hirers.

Basic terms and conditions

The temp will enjoy, after completion of 12 continuous calendar weeks undertaking the same role, the right to equal treatment as to basic terms and conditions relating to pay,

the duration of working time, night work, rest periods and annual leave, as compared to a permanent member of staff engaged directly by the hirer.

Pay for these purposes has been defined under Regulation 6(2) as:

- fees;
- holiday pay;
- time off in relation to statutory holidays;
- overtime;
- shift allowances and sociable hour premiums;
- bonuses (excluding profit share);
- any additional payment for dangerous and difficult tasks / duties;
- commissions or other emoluments, including vouchers or stamps relating to the employment.

Payments specifically excluded by Regulation 6(3) include:

- occupational sick pay;

- payments relating to pensions, retirement, and loss of office; and
- maternity, adoption or paternity pay.

Redundancy payments and long-term incentive plans are also excluded, as is the time taken for trade union activities and expenses incurred in carrying out employment.

The Regulations do provide access from day one to the temp to onsite facilities operated by the hirer. These include:

- canteen facilities;
- childcare provision;
- provision of transport services; and
- training.

While there is likely to be little dispute over access to canteen facilities, hirers may not wish to extend their provision of a crèche

Some periods away from the workplace will not count towards the 12 week qualifying period but will also not break the service already accrued. Absences relating to the following will not count towards the 12 week qualifying period:

- Sickness of up to 28 weeks;
- Annual leave;
- Jury service up to 28 weeks;
- Statutory or contractual absence; and/or
- Temporary cessation of the business according to custom and practice or through a strike or lock out.

Absences relating to pregnancy, childbirth or paternity leave up to 26 weeks will not break any service accrued prior to such absences.

Issues surrounding the same role

There are likely to be issues surrounding the 'same role' in determining whether a

temp has reached the 12 week qualifying period. In particular, whether any change of assignment is substantially different to the old one will raise the issue of whether or not the temp is employed in the same role.

Employment Tribunals are likely to look at the degree of difference between the duties or responsibilities of the two roles involved. It is hoped that when the Government guidance is eventually issued, further clarification will be given.

However, at the end of the day, it is only by case law that situations will be clarified for certainty.

Anti avoidance

In order to avoid unscrupulous hirers from deliberately preventing temps from qualifying for equal treatment by structuring assignments in certain ways, anti avoidance provisions have been included under Regulation 9.

If a temp has completed two or more assignments with the same hirer, or hirers connected to the hirer, or has worked on more than two occasions in a role that was not the same role as the previous role, the most likely explanation is that the hirer is attempting to prevent a temp from qualifying for equal treatment, and in this scenario Employment Tribunals can make awards against such hirers of up to £5,000.

Furthermore, the temp will also be deemed to qualify for equal treatment despite the attempt to prevent them from doing so.

One issue that is not entirely clear relates to breaks of service of at least six calendar weeks during or between assignments.

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Under the Regulations, such breaks in service would ordinarily mean that the temp, when re-engaged, is to start at week one for the purposes of the qualifying period.

However, where hirers deliberately lay off temps for up to six weeks before the 12 week qualifying period has been reached, and then seeks to re-engage six weeks later with the attempt of structuring assignments to avoid liability to provide equal treatment, the issue will amount to a structure of assignments and be caught by the anti avoidance provisions.

Access to employment

The Regulations will also impose an obligation on the part of the hirer and the temporary work agency to inform the temp of any vacancies arising, and give the temp worker the same opportunity as other workers to find permanent employment. Hirers will have to give consideration as to how they will advertise positions internally that are being fulfilled by temps.

Liability

The temporary work agency is liable for any breaches in relation to failure to provide the agency workers with basic work in terms and conditions to the extent that it is responsible for the infringement. In order to avoid liability, the temporary agencies will be requesting detailed job specifications and details of the workforce from their hirer clients.

The agency will be able to defend any claim by an aggrieved temp on the basis that it took all reasonable steps to obtain relevant information from the hirer about its terms and conditions of pay and that it acted upon receipt of such information reasonably.

The hirer will be responsible for any breach of the Regulations, to the extent that it is responsible for the infringement and having regard to the steps that it has taken to enable the temporary agency to provide information to the worker.

There is no joint and severable liability as between the agency and the hirer.

Remedies

An Employment Tribunal will have power to hear the following complaints:

- Failure to provide basic working terms and conditions;
- Failure to provide access to facilities and amenities;
- Failure to give access to permanent employment;
- Subjecting the agency worker to a detriment; and
- Breach of contract.

The powers of the Employment Tribunal

An Employment Tribunal can award compensation against the temporary work agency or the hirer for breach of the Regulations.

Any compensation will be calculated upon the basis of what is ‘just and equitable’. Any award will not be less than two weeks’ pay.

However, there is no cap on liability. Furthermore, as mentioned above, Employment Tribunals will have the power to award aggrieved temps up to £5,000 if the temporary work agency

or the hirer structures assignments to avoid liability.

Other powers that the Employment Tribunal will have include the power to make declarations against the temporary work agency or the hirer in relation to the future hiring of temps. There is no power to make any award in relation to injury to feelings. The Tribunal can also require a hirer or the agency to take action for the purposes of reducing the adverse effect on the agency worker.

Arising issues

What will be the position on 1 October 2011 for an agency worker who has completed 12 weeks in the same role?

Furthermore, who will bear the cost of paying the agency

worker equal pay after 12 weeks’ qualifying service – the agency or the hirer?

Hirers will have to put in place systems to calculate the period of service for temps, and once the qualifying period has been reached put in place systems so as to pay temps as they would permanent staff undertaking the same role.

Issues will arise as to how commercial contracts will be negotiated between the agency and the hirer insofar as the obligation to provide information to each other about the engagement.

The future

In future, many hirers may find it easier to hire staff direct than through use of an agency. Other obvious

questions that arise will be how Employment Tribunals apportion liability for breaches of the Regulations between the hirer and the agency.

Whatever the outcome of these questions, in the meantime, businesses who hire temps will have to put in place systems for ensuring equal treatment as to pay after 12 weeks’ service, and in the interim they should be undertaking a review of grading / pay job roles. Equally, temp agencies should be enquiring of their hirer

clients the details of the pay and conditions afforded to permanent members of staff.

About the author

Michael Delaney is a Partner and Head of Employment at Matthew Arnold & Baldwin LLP. He and his team have run seminars on the changes to employment law concerning agency workers for temporary work agencies and hirers, the North London CIPD group, the Association of Chartered Certified Accountants, and local businesses in Milton Keynes and Watford.

Further information

The Agency Workers Regulations 2010:
www.legislation.gov.uk/uksi/2010/93
www.mablaw.com



Questions

1. How many weeks will a temp have to complete to be afforded equal treatment?
2. What basic terms and conditions will a temp be able to enjoy after they have completed the requisite service?
3. Is a temp supplied through an umbrella organisation protected by the Agency Workers’ Regulations?
4. What do you understand by the term ‘Swedish derogation’?
5. What powers does an Employment Tribunal have if an assignment is structured to avoid liability?

Answers

1. The Regulations will give temps the right to equal treatment to basic terms and conditions after 12 weeks’ continuous service in the same role.
 2. Temps covered under the Regulations will enjoy the same basic terms and conditions relating to pay, the duration of working time, night work, rest periods and annual leave as compared to a permanent member of staff engaged directly by the hirer.
 3. Yes, as temps contracted through umbrella-type organisations will be deemed intermediaries, and such arrangements will also be covered by the Regulations.
 4. The ‘Swedish derogation’ describes temps who have permanent contracts of employment with an employment agency, who are guaranteed a number of hours per month and pay during a break between assignments. Any contract meeting the Swedish derogation between the temp and the agency will have to meet certain requirements regarding the minimum periods of notice and basic pay.
 5. Employment Tribunals will have the power to award up to £5,000 to an aggrieved temp if the temporary work agency or the hirer is found to have structured assignments to avoid liability.
- It will also be able to make declarations against the temporary work agency or the hirer in relation to the future hiring of temps.