



Checklist

Impact assessment check-list

Agency Worker Regulations 2010

This document is intended to assist REC members and their clients plan ahead for the Agency Worker Regulations (“the Regulations”) which will come into force on 1 October 2011. This impact assessment check-list/planner is one of a number of documents contained in the REC’s AWR Toolkit. Members should also read the following Factsheets which set out in detail the requirements of the Regulations:

- Factsheet 1:** An introduction to the Agency Worker Regulations
- Factsheet 2:** The application of the Regulations to limited company contractors
- Factsheet 3:** How does an agency worker qualify for equal treatment?
- Factsheet 4:** What is equal treatment?
- Factsheet 5:** Liability for breach of the Regulations
- Factsheet 6:** Maternity rights under the Regulations
- Factsheet 7:** Employed agency workers – when does equal treatment not apply?

In the REC’s discussions with clients, their initial reaction has been to consider radically changing current resourcing models. However, following more detailed analysis of current pay rates and methods for establishing the right comparisons, those same clients have found that implementing equal treatment measures do not necessarily entail the significant impact on direct costs that they initially envisaged.

The first stage of the implementation process is therefore to evaluate the potential impact of the Regulations in terms of cost, risk and working relationships with clients and other links in the supply chain. The following questions are intended to act as a prompt and to help employment businesses and their clients implement the Regulations in a legally compliant and cost-effective manner.

1. Assignment lengths

- 1.1. What are the current average lengths of assignments?
- 1.2. What proportion of assignments last more than 12 weeks?

NOTE:

In order to qualify for equal treatment in terms of pay and working conditions, agency workers must work for 12 weeks in the same role with the same client. Therefore the length of assignments will determine whether an agency worker will qualify for equal treatment.

However, there are two rights (1) the right to access collective facilities (such as canteens, childcare and transport services) and (2) the right to receive information on vacancies within the hirer. These rights apply from the first day of an assignment and are not subject to any qualifying period. (see section 5 below) and Factsheet 3 for further details.

Members should continue to use the REC model confirmation of assignment details form which specifically requests the duration of each assignment as required under the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

- 1.3. If assignments are relatively short, are they either regularly extended or regularly repeated?
- 1.4. Is there an average break period between assignments? If yes, what is it?

- 1.5. **Are breaks between assignments of varying lengths and/ or ad hoc? Does the hirer use temporary workers on a seasonal basis.**
- 1.6. **Where there are breaks in assignment, does the agency worker usually go back into the same role with the client or are there a variety of roles which one agency worker can undertake?**

NOTE:

The qualifying clock will be suspended where there is a break of less than six weeks. It will stop entirely if there is a break for over six weeks, except in certain circumstances, some of which include, jury service, when the client's business is temporarily closed, sickness or injury of up to 28 weeks. Please see Factsheet 3 for more details of other permitted breaks which will suspend the clock. Therefore, even if assignments are short but are regularly repeated they may count towards the 12 weeks period.

A new qualifying clock will commence for each new role the agency worker undertakes with the same client. See Factsheet 3 for further details.

Please note that the Regulations contain some anti-avoidance measures. Agencies and/or clients that structure assignments in a way as to deliberately prevent an agency worker from qualifying for equal treatment or continuing to benefit from equal treatment may be liable for a fine of up to £5000. See Factsheet 5 for further details.

2. Employment status of temporary workers supplied to the client?

- 2.1. **What is the status of the temporary workers you currently supply or propose to supply to the client? i.e. is the worker on a contract of employment or contract for services.**
- 2.2. **Are any of those workers genuinely self-employed? Are they engaged via limited companies, either their own limited companies or umbrella companies?**

NOTE:

Genuinely self-employed workers are excluded from the scope of the Regulations. However, neither agencies nor clients should assume that because an agency worker works via a limited company that she/he is genuinely self-employed. Agencies will have to consider all the relevant factors to ascertain whether an individual is indeed an agency worker or whether she/he is outside the scope of the Regulations. Equally, just because someone does not work through a limited company does not mean that she/he is an agency worker. See Factsheets 1 and 2 for further details.

- 2.3. **Does the client use more than one agency to engage temporary workers?**
- 2.4. **If yes, has the worker worked with the same client previously and what was the length of each assignment?**

NOTE:

Agency workers accrue qualifying time when they work in the same role for the same client. They do not have to be supplied by the same agency. Therefore agencies and their clients need to track qualifying time accrued by agency workers working through more than one agency. Importantly, there is no obligation on an agency worker to inform the agency that she/he has worked at the client previously and has accrued qualifying time, though the failure to answer correctly if asked will be taken into account if they make a claim for equal treatment. See Factsheet 3 for further details.

2.5. Are there intermediaries in the supply chain including master or neutral vendors? If not at present, does the client propose introducing a master or neutral vendor arrangement in the future?

2.6. Does the client use a managed service arrangement for some or all of its workforce?

NOTE:

Intermediaries such as master or neutral vendors and umbrella companies are temporary work agencies for the purpose of the Regulations. If there are such arrangements in place, all parties in the supply chain will need to consider how equal treatment measures will be implemented and monitored. It will be crucial that master and neutral vendors assist the second tier suppliers to comply with the Regulations. If an agency worker brings an Employment Tribunal claim, claiming that she/he has not received the equal treatment to which she/he was entitled, all parties in the supply chain are potentially liable. The tribunal will decide on liability and will apportion any compensation accordingly. See Factsheet 5 for further details.

Whilst an employment business simply provides workers to work under the client's supervision and control, a managed service contract provider will be responsible for delivering an entire service for a client and will supervise and direct the workers itself. In this sense, a managed service contract provider does not meet the definition of a temporary work agency and will not be required to comply with the same obligations as agencies. However if the managed service contractor uses an agency to supply its workers, the workers may still meet the definition of agency workers for the purpose of the Regulations and the managed service provider may be required to comply with the hirer obligations under the Regulations.

Agency workers who are employed by the agency on a Regulation 10 contract (commonly known as a "Swedish Derogation" contract, are not entitled to equal pay but they are entitled to equal treatment in respect of working conditions, access the client's collective facilities and information on current vacancies. See Factsheet 7 for further details.

3. Pay and benefits

NOTE: The obligation is on the agency to ensure that the agency worker receives equal treatment in terms of pay and working conditions. It is down to a commercial negotiation between the agency and the client as to whether the client will contribute towards the agency's financial obligations either in whole or in part.

3.1. What are the current rates of pay paid to agency workers? (You will need to break this down into categories of the worker based on the type of work, skills, qualifications or seniority where relevant).

NOTE:

For the purposes of the Regulations "pay" includes basic pay, certain bonuses, commission, holiday pay, shift premia and overtime. Therefore, the agency needs to fully understand the client's pay structures in order to be able to work out what rate(s) of pay to pay to a qualifying agency worker.

3.2. How does this currently compare with the client's employees? Does the client operate formal pay bands?

NOTE:

Where there are formal pay bands this will involve, comparing the current pay rates with entry level pay rates. Where no formal pay bands are currently used, this may involve looking at the pay rates of existing employees doing the same or similar work. See Factsheet 3 for further details.

3.3. What are the current overtime rates being offered to employees? How do these rates differ from the overtime rates currently offered to temporary workers?

3.4. What bonus payments and commissions are currently offered to employees and which may need to be applied to temporary workers?

NOTE:

Certain bonus payments and commissions are included in “pay” for the purposes of the Regulations. Bonuses have to be “directly attributable to the amount or quality of the work done” by the agency worker. However, bonuses which are attributed to a company’s financial performance or which are paid to reward long term service are not payable to an agency worker. See Factsheet 4 for further details.

4. Holiday entitlements

4.1. What holidays are the client’s directly engaged workers entitled to?

NOTE:

Temporary workers are entitled to receive statutory holiday of 28 days. Under the Regulations agency workers will be entitled to the same holiday entitlement as if they have been directly recruited by the client, even where this exceeds the statutory entitlement.

Holiday entitlements can increase with seniority. The relevant holiday entitlement for the purposes of equal treatment will depend on the holiday entitlement the client would give to a comparable employee, or if there is no comparable employee, an individual whom it would directly engage into that role. See Factsheet 3 for further details.

5. Collective facilities and permanent employment opportunities

5.1. What collective facilities are currently available to the client’s own directly engaged workforce?

5.2. Which, if any, of these collective facilities are currently available to temporary workers?

NOTE:

Agency workers will have the right from day one of an assignment to access to the client’s collective facilities such as canteens, gyms, crèches, car parking and free transport. If the client does not extend these collective facilities to agency workers the client will need to be able to objectively justify why this is not the case. Cost alone will not be an objective justification. See Factsheet 4 for further details.

5.3. How does the client advertise internal vacancies? Are there notice-boards or intranet sites that all workers at its site(s) have access to?

NOTE:

From day one of an assignment, agency workers are entitled to access information on job opportunities within the client's organisation. The client does not have to actively seek out each agency worker to tell them about vacancies but they do need to ensure that they can access the relevant information. Importantly, there is no obligation on the client to shortlist, interview or directly engage an agency worker. See Factsheet 4 for further details.

6. Maternity rights for agency workers

6.1. What proportion of the client's workforce is female?

6.2. What sort of roles does the client have?

6.3. If a pregnant agency worker's assignment is terminated on health and safety grounds related to pregnancy or maternity, will the agency be able to source suitable alternative work at that client or will they have to find suitable alternative work elsewhere?

6.4. Are there any health and safety issues at the client's site(s) which may pose particular concern to pregnant agency workers and which could result in assignments being terminated?

NOTE:

Pregnant agency workers will enjoy new rights under the Regulations. If an assignment is terminated on pregnancy related grounds, the pregnant agency worker should be provided with suitable alternative work. In the event that the agency cannot find suitable alternative work, the agency will be required to pay the worker for the remainder of the duration or the expected duration of the assignment which was terminated. See Factsheet 6 for further details.

7. Limiting the risk of tribunal claims

7.1. What current mechanisms are in place to deal with complaints from agency workers?

NOTE:

An agency worker who believes that she/he has not received his/her equal treatment entitlements can make a written request the agency for further information. The agency must respond within 28 days, failing which the agency worker can make a similar request to the client after 30 days.

An agency worker can make a claim to an Employment Tribunal if she/he has not received equal treatment or where the agency or client have breached the Regulations in some other way.

Therefore, agencies should have appropriate procedures in place to firstly deal with any complaints, and secondly to deal promptly with any written requests for information. It is vital that lengthy supply chains including other intermediaries provide for such information flows. Effective procedures will play a key role in minimising the risk of tribunal claims.

7.2. Has the client recognised one or more unions? How does the client engage with the union(s)? What is the state of relations with the union(s)?

NOTE:

The debate on agency work has been heavily politicised and there will be pressure to show that the Regulations are making a difference on the ground. Therefore it may be a good idea for agencies and clients to engage with the union(s) at an early stage to discuss implementation plans.

7.3. Who is responsible in your organisation for keeping worker's records?

Implementing equal treatment measures do not necessarily entail a significant impact on direct costs or increase the risk of Employment Tribunals. The areas covered above will act as a 'prompt' for conducting the initial assessment of what the Regulations will mean in practice.

The extent that the regulations do impact on direct costs will determine the need to look at possible new structures and ways of sourcing and managing temporary and contract staff. An effective impact assessment is the first stage of the planning process and should kick-start a process or regular dialogue and active engagement between employers and their recruitment providers.

**REC Legal Services
April 2011**

This document has been created for corporate REC members for guidance only. It is not a substitute for legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.

All rights reserved: no part of this publication may be reproduced, stored in an information storage and retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written permission of the REC.

© REC 2011