

Model Agency Worker Policy

1.0 Purpose

- 1.1 The guidance seeks to explain how the Regulations will work in practice, and to explain the Regulations' implications for agency workers, employment agencies and hirers.

2.0 Aims

- 2.1 The guidance does not have statutory status and ultimately the interpretation of the Regulations will be a matter for the employment tribunals, through which the Regulations will be enforced. However the guidance is likely to be the first port of call for those looking to interpret the Regulations. The guidance sets out practical examples of how the Regulations will operate and includes sections on: who is covered by the Regulations:

- qualifying for equal treatment, which includes calculating the 12-week qualifying period
- what is included in the definition of "pay" for the purpose of working out workers' entitlements
- identifying basic working and employment conditions that are covered by the Regulations, and
- Calculating holiday entitlements.

3.0 Scope and definition

- 3.1 This policy applies to all managers.

4.0 Who is covered by The Regulations

4.1 ♦ Individuals who work as temporary Work Agency (TWA)

♦ Agency worker

An agency worker (often referred to as a 'temp') is someone who has a contract with the TWA but who temporarily for and under the direction and supervision of the hirer

♦ Hirer

The hirer (end-user) is the person who is engaged in economic activity and which books agency workers via a TWA. The hirer is responsible for supervising and directing the agency worker while they undertake the assignment. A hirer will have its own legal identity – so a division within a company will not be separate hirer if it does not have its own legal identity.

- 4.2 The unique tripartite relationship between agency worker, agency and hirer is a key feature of this regulations and who is covered by them.

The key elements required for someone to be an agency worker are:

- ◆ There is a contract between the worker and a TWA
- ◆ That worker is temporarily supplied to a hirer by the TWA; and
- ◆ When working on assignment the worker is subject to the supervision and direction of that hirer
- ◆ The individual is not in a business on their own account (where they have a business to business relationship with the hirer who is a client or customer)

4.3 The Regulations come into force in October 2011, and will give agency worker 'temps' the right to equal treatment in terms of "basic working and employment conditions", as if they had been employed directly by the hirer to do the same job. In many cases this will mean that agency workers will be entitled to the same rate of pay as a comparable employee. However, many of the rights, including the right to the same rate of pay as a comparable employee, are subject to the worker working for the hirer for 12 weeks or more

4.4 **Hirer for agency supply teachers**

4.4.1 **Maintained school**

In foundation schools, voluntary aided schools and foundation special schools, the "hirer" is the school's governing body, being the legal entity to whom the worker is supplied and who is responsible for the supervision and direction of that worker.

In community schools, voluntary controlled schools, community special school and maintained nursery schools, the "hirer" is either the local authority or the school's governing body. This needs to be determined in each case and depends on to whom the worker is supplied and who supervises and directs that person's work.

An agency supply teacher will be employed by the school's governing body, meaning the 12-week qualifying period will be broken when the worker moves from one school to another i.e. the qualifying clock will resets to zero with each different hirer.

5.0 **Definition of 'new hirer'**

The qualifying clock will be reset to zero if the agency worker stops for one hirer and beings working for another.

5.1 A new hirer for this purpose must be a different person (a different legal entity). Where a single hirer has multiple sites, merely moving the worker from one site to another will not usually break continuity (unless it is a substantively different role).

5.2 Where a hirer is part of a larger group and each group company has its own legal identity, then the qualifying period will restart when an agency worker moves between the different legal entities.

5.3 **Responsibility of the Hirers and Temporary Worker Agencies**

Where you hirer temporary agency workers through temporary work agency, you should provide your agency with up to date information of your terms and conditions to that hey can ensure that an agency worker received the correct

Hirers and TWAs should also be aware of the anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the qualifying period.

A hirer must notify a TWA in writing when there is a new role that is substantively different and record details of on the job requirements

The TWA must provide a description of the new role in writing to the agency worker. The TWA should record details about the new vacancy and notify the agency worker, in writing, that their role has substantively changed and that the qualifying period will start again.

6.0 **Substantively different**

If there is a substantive change to a job role within the same hirer, a new qualifying clock commences for the new role. However, for this to happen, the work or duties which make up the whole or main part of a role must be substantively different. It is not enough that the line manager has changed but not the job requirements or that the agency worker has transferred between similar administrative functions or has moved within a single, relatively small business unit or has been given a different pay rate.

6.1 **The factors that may make the work or duties substantively different**

A combination of the following characteristics can help to establish if the work or duties are substantively different.

- Are different skills and competences used?
- Is the pay rate different
- Is the work in a different location/cost centre?
- Is the line manager different?
- Are the working hours different?
- The role requires extra training - and / or a specific qualification that wasn't needed before?
- Is different equipment involved?

7.0 **New entitlements for agency workers**

7.1 ***Day one***

7.1.1 Agency workers are entitled to be treated no less favourably than a comparable worker or employee in relation to access to collective facilities and amenities provided by the hirer and also access to information relating to vacancies.

7.2 ***After 12 weeks in the same job***

7.2.1 After an agency worker completes 12 week qualifying period with the same hirer, in the same role, they will be entitled to have the same basic terms and conditions of employment as if they had been employed directly by the hirer.

7.3 ***Calculating the 12 week qualifying period***

7.3.1 The 12 week qualifying period is triggered by working in the same job with the same hirer for 12 calendar weeks. A calendar week in this context will comprise any period of seven days starting with the first day of any assignment. Calendar weeks will be accrued regardless of how many hours the worker does on a weekly basis. Therefore, even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after the 12 calendar week calculated in this way.

7.3.2 For example, an agency worker begins work on a Tuesday so all work done up to and

including the following Monday will count as one calendar week.

8.0 The Qualifying Clock

The working patterns of agency workers can be irregular. The Regulations therefore provide for a number of circumstances in which breaks do not prevent agency workers from completing the qualifying period.

These provisions can best be explained by thinking of the qualifying period as a clock which runs from 0 – 12. Sometimes a gap between assignments – or a move to a new assignment – will mean that the clock is reset to 0 and must start again. In other circumstances a break will merely ‘pause’ the clock which will continue to tick when the agency worker returns. In some limited circumstances, the clock will continue to tick even if the agency worker is not working on an assignment.

8.1 Reason for the qualifying clock to reset to zero;

- ◆ Most commonly it will be because an agency worker begins a new assignment with a new hirer
- ◆ Where an agency worker remains with the same hirer but is no longer in the same role. The circumstances in which an agency worker is regarded as no longer working in the same role are considered below.
- ◆ If there is a break between assignments with the same hirer of more than 6 weeks (which is not one which ‘pauses’ the clock or during which it continues to ‘tick’)

8.2 Types of break that will cause the qualifying clock to ‘pause’

- A break for any reason where the break is **no more than six calendar weeks** and the agency worker returns to the same role with the same hirer
- A break of up to 28 weeks because the agency worker is incapable of work because of **sickness or injury**
- Any break which is for the purpose of taking leave to which the agency worker is entitled, including annual leave.
- A break up to 28 calendar weeks to allow the agency worker to perform **jury service**
- A break caused by a **regular and planned shutdown** of the workplace by the hirer (for example at Christmas)
- A break caused by a **strike, lock out or other industrial action** at the hirer’s establishment.

8.3 Breaks where the clock continues to tick

- Breaks due to pregnancy, childbirth or maternity which take place during pregnancy and up to 26 weeks after childbirth.
- Any breaks due to worker taking maternity leave, adoption leave or paternity leave.

8.4 Different types of consecutive absences

An agency worker has a break of 5 weeks between assignments, then is absent for 2 weeks due to sickness. Sickness absence ‘pauses’ the clock, which then resumes ticking when the worker returns to the same role. In these circumstances, the break is longer than 6 weeks but continuity is not broken as the clock pauses after 5 weeks.

9.0 How to identify ‘basic working and employment: conditions’ and the relevance of a “comparator”

9.1 How equal treatment is established

9.1.1 Equal treatment is not required in respect of all the terms and conditions that the person would have received had they been recruited directly. It covers basic working and employment conditions. They are those which are ordinarily included in relevant contracts (or associated documents such as pay scales, collective agreements) of direct recruits. This means terms and conditions normally set out in

- (a) Standard Contracts;
- (b) A pay scale or pay structure;
- (c) A relevant collective agreement;
- (d) A company handbook or similar

It would not apply if there were genuinely no ‘basic working and employment conditions’ that apply generally.

9.1.2 It is not necessary to look for a comparator. Given what is said above, it is quite possible to identify the appropriate “basic working and employment conditions” without one. However, the hirer will be deemed to have complied with the Regulations on equal treatment on basic working and employment conditions if the hirer identifies an appropriate comparator and treats the agency worker in the same manner. In these circumstances the comparator must be an employee.

9.1.2 A comparator needs to be engaged in broadly similar work, but account can be taken of their skills and qualifications as this may justify a higher level of pay for the comparator. They must work at the same or, if there is no comparable employee in the same workplace, in another of the hirer’s workplaces. They will not be a comparable employee if they are no longer employed by the hirer.

10.0 Pay

Following the completion of 12 week qualifying period, the agency worker is entitled to the same basic terms and conditions that he or she would have received if recruited directly. However there are some pay which will be excluded. See appendix A

10.1 Performance appraisal systems

Though it may be easier to fully integrate agency worker into a performance appraisal system, the Regulations does not make this a requirement.

The agency worker is entitled to:

10.2 Paid Holiday leave

All workers have a statutory entitlement to 5.6 weeks per year which includes bank and public holidays (based on their working patter).

As with rest breaks, if a hirer would have given a more generous contractual leave entitlement to the agency worker if recruited directly to fill the same job, the agency worker concerned should receive the same enhanced entitlement once the 12 -weeks qualifying period has elapsed.

10.3 Payment in lieu option

Any additional entitlement over and above the statutory entitlement can be dealt with as a one off payment at the end of the assignment as additional, contractual leave which is in excess of the statutory minimum.

Payment of the statutory entitlement to annual leave should be taken to ensure that individuals do take the leave to which they are entitled.

10.4 Pay between assignments

There is an exemption from equal treatment provision on pay (and holiday pay) where a TWA can offer an agency worker permanent contract of employment and pay the agency worker between assignments i.e. during the periods when they are not working when there are no available suitable assignments for the agency worker. This means that after 12 weeks in a given job, the agency worker will not be entitled to the same pay as if they had been recruited directly.

The TWA should explain to the agency worker so they can make an informed decision as to whether they are willing to agree to forgo this entitlement and enter into a permanent contract with them. In any event, the contract of employment has to contain a statement to the effect that entering into such a contract means that the agency worker does not have any entitlement to equal pay as set out in the regulations.

The rate of pay between assignments must be at least 50% of an assignment pay, at National Minimum Wage and calculated using a reference period. The reference period is usually the 12 weeks immediately preceding the period of pay between assignments.

11.0 Pregnant workers and new mothers

11.1 After completing 12 week qualifying period in a given job, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment.

11.2 If they no longer complete the duties of the original assignment for health and safety reasons, they will also need to be found alternative sources of work paid, (paid at a rate that is no less favourable than the last assignment which was terminated on health and safety grounds related to the pregnancy.

11.3 If alternative work cannot be found, then the pregnant women will have the right to be paid by the agency for the remaining expected duration of the original assignment.

11.4 This provision does not give the agency worker any additional entitlement to maternity, paternity or adoption rights beyond those to which they would otherwise have been entitled.

12.0 What restrictions are there on the Temporary Worker Agency charging “temp to perm” fees?

The Temporary Worker Agency supplying temporary staff to hirer can charge a transfer fee where a temporary worker accepts an offer of employment made by the hirer. However, the contract between the TWA and the Hirer must contain a term giving the hirer the option, instead of paying the transfer fee, to choose to continue hiring the worker for a specified period of time, after which the worker will transfer to its employment with no fee payable. There is no limit on this extended period of hire.

A Hirer can also avoid paying a transfer fee once a certain period of time has elapsed after the end of a worker's assignment with it. This period is 14 weeks from the start of

the assignment or eight weeks from the end of the assignment, whichever ends later. After this period the hirer or employer is free to hire the individual directly.

13.0 Monitoring & Review

13.1 This policy will be reviewed six months after implementation date.

13.2 Implementation of the policy will be monitored through statistical reporting by Cambridge Education @ Islington Human Resources Department.