

The Agency Worker Regulations

Faststream Recruitment's Guide for Clients

Introduction

Many of you will have heard about the impending introduction of the Agency Workers Regulations (AWR). Whilst it is one of the most fundamental changes to the temporary labour market in recent memory, it is not the catastrophe that some commentators would have you believe. We have written this guide to give you the facts, what the AWR means for your business and to dispel some of the scare stories that are circulating.

Background

The AWR is a piece of legislation that started life in Europe and is now coming into force in England, Scotland and Wales from the 1st October 2011. The purpose of the AWR is to offer protection to temporary workers by ensuring that they receive equal pay and working conditions to an equivalent permanent member of staff. Whilst the primary group of workers the legislation was trying to protect are the very low paid, the AWR's "one size fits all" approach means that all temporary workers are affected. However, whilst hiring companies in the lower paid sector have significant issues to overcome, the impact on the professional services sector will not be as marked.

One important point to note is that nothing in the Regulations will alter the employment status of the temporary worker. The AWR will not make the Temporary Worker an employee of your company or of Faststream.

Who is a Temporary Agency Worker?

For the purposes of the AWR, an agency worker is:

- an individual;
- who is supplied by a temporary work agency (e.g. Faststream) to work temporarily under the supervision and direction of the hirer; and who has a contract under which they provide their service personally for the agency.

There are a few points to note:

- Limited company contractors and contractors utilising Umbrella companies or any other kind of intermediary are classified as agency workers.
- Any workers who are employed by you on a permanent basis after an introduction by an agency are excluded.
- Workers who are genuinely self-employed are excluded. In this circumstance, the agency worker must be able to demonstrate that they can meet the Inland Revenue self-employment tests. Faststream recommends that all agency workers are treated as "in-scope" until the agency worker can demonstrate beyond reasonable doubt that they are "in business on their own account".

There are no obvious loop holes to exclude agency workers from the AWR.

When is an Agency Worker entitled to equal treatment?

Except for some 'Day One' rights (detailed below), agency workers are entitled to the same treatment after they have completed 12 weeks in the same role at the same hirer. This 12 weeks period is known as the qualifying period or qualifying clock. This is irrespective of working pattern i.e. as long as the agency worker works part, however small, of each week, they will accumulate the qualifying time.

The Qualifying period

The qualifying period starts on the first day of an assignment. For those agency workers whose assignments commenced prior to the 1st October 2011, their qualifying period will not be back dated to their start date but will commence on the 1st October 2011. This means that for the majority of the provisions of the AWR will not come into effect until the 23rd December 2011.

The qualifying clock stops if there is a break in the assignment of more than 6 weeks, or if the agency worker starts a new assignment with your company but in a substantially different role. It is crucial the role is different, there are anti-avoidance provisions to prevent hirers and agencies taking advantage of workers on this basis.

The qualifying clock can be paused as opposed to stopped. The following are situations in which a workers can be absent from an assignment and when they return, pick up the qualifying clock from where they left off.

- Breaks of six weeks or less for any reason
- Certified sick leave for up to 28 weeks
- Statutory paternity or adoption leave
- Time off for Jury Service (up to 28 weeks)
- Industrial action
- For pregnancy and maternity, the clock will not be stopped or paused during a protected period from the start of the pregnancy to 26 weeks following birth

One thing to note is that the above is only referring to the qualifying clock. There is no change to any obligations from your company to the agency worker in terms of assignment duration. The responsibility for keeping track of the qualifying period is down to Faststream.

Two final points regarding the qualifying period. An agency worker can have more than one qualifying clock running simultaneously with a number of different hirers; and, an agency worker can accrue qualifying weeks through different agencies with the same client for the same role, therefore Faststream would require your company to advise us if you had used the services of a particular agency worker previously.

To illustrate with an example:

| Week Commence | Work / Break | Cumulative Qualifying weeks | Week No. | Work Commence | Cumulative Qualifying weeks |
|---------------|--------------|-----------------------------|----------|---------------|-----------------------------|
| 03/10/11 | Work | 1 | 19/12/11 | Work | 8 |
| 10/10/11 | Work | 2 | 26/12/11 | Work | 9 |
| 17/10/11 | Break | 2 | 02/01/12 | Break | 9 |
| 24/10/11 | Break | 2 | 09/01/12 | Break | 9 |
| 31/10/11 | Break | 2 | 16/01/12 | Work | 10 |
| 07/11/11 | Break | 2 | 23/01/12 | Work | 11 |
| 14/11/11 | Work | 3 | 30/01/12 | Work | 12 |
| 21/11/11 | Work | 4 | 06/02/12 | Work | 13 |
| 28/11/11 | Work | 5 | 13/02/12 | Work | 14 |
| 05/12/11 | Work | 6 | 20/02/12 | Work | 15 |
| 12/12/11 | Work | 7 | 27/02/12 | Work | 16 |

John starts an assignment on 3rd October and works for 2 weeks. He then takes a break of 4 weeks before returning for another 7 weeks. After a further break of 2 weeks he then completes another 7 weeks work. At what point is he entitled to equal treatment?

So in this example, Mr A would be entitled to equal treatment from 6th February 2012 onwards.

What is equal treatment?

Agency workers who have completed 12 weeks of service are entitled to the same basic working and employment conditions as a comparable permanent member of staff.

These include:

- Pay (defined below)
- Duration of working time
- Night Work
- Rest periods
- Annual Leave

Notice periods are not included.

Comparative Employee

An employee is a comparative employee in relation to an agency worker if both are working for and under the supervision and direction of the client and engaged in the same or broadly similar work having regard to whether they have similar level of qualification and skills where relevant.

When trying to establish pay (and other working conditions) formal pay bandings can be considered. In the absence of a formal structure then it will involve looking at the rates of pay of existing staff.

Additional experience and qualifications can be taking into account when justifying why permanent staff are paid more than agency workers.

Length of service can also be considered if it forms part of a qualification period to receive certain benefits e.g. staff members receive 5 days extra holiday after 3 years service.

Definition of Pay

Pay is defined in the regulations as "any sums payable to a worker of the hirer in connection with the worker's employment including any fees, bonus, commission, holiday pay or other emoluments referable to the employment".

Therefore pay includes:

- Basic pay, overtime and shift premium
- Bonuses based upon workers personal performance
- Commission Payments
- Holiday pay
- Voucher e.g. luncheon vouchers
- Car allowance

Where bonuses are linked to appraisals then the regulations state that agency workers can be appraised for the purposes of establishing equal pay without risk of them being subsequently classified as employees of the hirer or agency.

Pay does not include:

- Pension (although separate provisions for pensions will be introduced in 2012)
- Occupational sick pay
- Occupational maternity, paternity and adoption pay
- Redundancy pay
- Financial participation schemes e.g. Save as you earn
- Bonuses linked to long service / loyalty
- Bonuses related to company performance
- Life and Health benefits
- Childcare vouchers

Annual Leave

Currently agency workers are entitled to statutory holiday i.e. 4 weeks plus public holidays. If comparative members of staff are given more holiday, then after twelve weeks the agency worker will be entitled to the additional holiday. However the additional days over and above the statutory holiday allowance can be rolled up into the weekly pay of the agency worker.

For example:

Permanent member of staff earns £30,000 pa working 37.5 hours per week. They are also entitled to 23 days holiday per year plus bank holidays.

| | |
|------------------------------------------|---------------|
| Basic hourly rate | £15.38 |
| Additional holiday pay | £0.23 |
| Minimum AWR compliant hourly rate | £16.61 |

It is the responsibility of Faststream to ensure that agency workers are receiving equal terms and conditions; however we are unable to do this without your cooperation. As part of the assignment conditions we will need to ask you to complete a question so that we can establish if there is a comparator employee and if so, under what terms and conditions they are employed.

Day One rights

From the first day of the assignment an agency worker is entitled to certain rights. These are as follows:

- Access to collective facilities such as canteens, childcare facilities, car parking. Agency workers can be excluded from these facilities provided that the client can objectively justify the reason for not providing access. Cost alone is not a justifiable reason.
- The right to be informed by the hirer of relevant vacant posts with the hirer. There is no obligation on the hirer to employ the worker. This right could be satisfied by giving workers access to the company intranet.

It is the responsibility of the hirer to ensure that these rights are provided.

Pregnant Workers

Pregnant agency workers who have completed the qualifying period have the right to be paid whilst attending ante-natal appointments.

Anti-Avoidance

The AWR has a large section dedicated to preventing agencies and hirers trying to circumnavigate the regulations. It will be deemed anti-avoidance if "the most likely explanation for the structure of the assignment is intended to prevent the agency worker from being entitled to equal treatment".

The penalty for the breach of the anti-avoidance provision is £5,000 per occurrence.

Enforcement

The AWR will be enforced through the employment tribunals and liability will be apportioned between agency, clients and intermediaries in accordance with their view on the proportion of blame of each party.

What next

Faststream will be issuing new terms and conditions to all clients reflecting the changes brought in by the AWR. We will also be changing our contracts with our entire temporary workforce.

For existing assignments we will be working with you to ensure that we have the necessary information we need to be able to ensure that all of our agency workers are being treated equally.