

brightred



Responding to the
Agency Workers regulations 2010

**A checklist for employers
from Brightred Resourcing Limited**

Effective as of 1st October 2011, and not retrospective

As applies to Agency Workers

An agency worker is an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of the hiring client; and has a contract of employment with the temporary work agency or any other contract to perform work and services personally for the temporary work agency.

An individual can be an agency worker even if he or she works through an intermediary, e.g. an umbrella company.

Agency workers cannot contract out or 'opt-out' of the Regulations.

In summary, within the scope are:

- All PAYE workers
- All umbrella provided workers
- Some limited company workers

Out of scope are:

- The Government's stated intention is that workers who are genuinely in business on their own account will not be within scope of the Regulations. Unfortunately Regulation 3 which defines who is an agency worker provides no specific exclusion for limited company contractors
- The question of whether a limited company contractor is or is not covered by the Regulations will depend on whether or not the individual meets the definition of an agency worker. Any person who carries on business of their own account, through a limited company or otherwise and who does not work under the hirer's supervision and direction is not covered by the Regulations
- Self-employed workers

The 12 week qualifying period:

- An agency worker is not entitled to equal treatment until he or she has completed the 12 week qualifying period
- An agency worker must work in the same role with the same hirer for 12 calendar weeks (any week during which the agency worker works is counted)
- If there is a break of 6 weeks or more, the clock starts again (except in certain circumstances where a break of more than 6 weeks will only suspend the clock)
- Sick leave does not 'break' the clock unless it is for 28 weeks or more
- Jury service and temporary shut downs (Christmas break) do not 'break' the clock
- Pregnancy and maternity do not break the clock – for the protected period from the start of the pregnancy to the end of the 26 weeks following childbirth (Regulation 7)



Establishing 'Equal Treatment':

- An agency worker is entitled to the same 'relevant terms and conditions' as a comparable employee of the client
- An employee is a comparable employee in relation to the 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, where relevant, to whether they have a similar level of qualification and skills and
 - The comparable employee works or is based at the same establishment as the agency worker, or works or is based at another establishment, if there is no comparable employee at the site the agency worker works at. (Regulations 5 and 6)

What does 'Equal Treatment' cover?

'Relevant terms and conditions' are:

- Pay (includes overtime, shift premiums, bonuses attributable to amount or quality of work performed, commission and holiday pay)
- Night work
- Rest periods
- Rest breaks
- Annual leave (the same paid holiday as if they had been directly recruited)
- Collective facilities (canteen and transport services from day one)
- The right to be informed of relevant vacant permanent posts
- The right for pregnant workers to be paid when attending ante-natal appointments
- Pregnant workers must be offered suitable alternative work, if the current role can no longer be fulfilled

The following are excluded from the definition of pay:

- Pension
- Occupational sick pay
- Maternity, paternity and adoption pay
- Redundancy payment
- Financial participation schemes
- Bonuses based on organisational performance and those designed for long-term motivation and retention of staff
- Expenses, advances and loans, health and life assurance
- TUPE rights of permanent staff



Enforcing the regulations:

- The Regulations state that if a qualifying agency worker does not receive equal treatment (basic working and employment conditions), then the agency worker can pursue a claim in an Employment Tribunal against either the agency or the client (or both). An Employment Tribunal will analyse the facts to determine to what extent each party is responsible for the breach of the Regulations
- This means that when determining what compensation will be awarded to an agency worker who is successful in bringing a claim, the Employment Tribunal can apportion the award against the party or parties which it concludes is responsible for the failure to provide equal treatment
- In practice this is likely to result in the agency that has the direct contractual relationship with the agency worker bearing primary liability for the breach since it will be responsible for paying the agency worker and agreeing the terms and conditions that apply to the agency worker
- However, in practice, the only way that the agency will be able to ensure that the agency worker works under the same terms and conditions (pay and working conditions) as would have applied if the agency worker had been engaged directly by the client, is to rely on information that it receives from the client as to what those terms would be

Enforcing the regulations - Agency defence:

To this end, the Regulations provide a specific defence for agencies if:

- The agency either obtains information from the end user client about the basic working terms and employment conditions in the client's business or takes reasonable steps to obtain this information; and
- Acts reasonably in determining what working terms and employment conditions the agency worker should be engaged under once the 12 week qualifying period has been reached; and
- Ensures that it provides the agency worker with those working and employment conditions
- If the agency complies with the above it will not be liable if the agency worker does not receive equal treatment. If the client is at fault because, for example, it has provided incorrect information to the agency, then the client rather will be liable

What is a Contractor /Temporary worker?

- A Temporary/Contract worker is hired to substitute for an employee who is on leave or holiday or to staff a project for which there are insufficient permanent employees to carry out the task
- They are usually hired for a limited time because the work load exists for a specific period
- Temporary/Contract work ranges from administrative hourly paid to niche professional daily paid work
- They may work for one or several companies, and the working periods may be for days or months at a time but can be irregular

What is the difference between...

A Limited Company Contractor

- Is working through a Limited Company (usually their own)
- Has their own Accountant who processes all of their accounts
- Is responsible for the payment of their own Tax and NI contributions
- Can offset certain expenses against their tax allowances



A PAYE Contractor (also known as a temporary worker)

- vAccrues paid holiday pay and is entitled to take 28 paid days holiday per year (currently)
- Has a contribution towards NI paid for them
- Is usually on a lower rate (normally hourly paid) than Limited Company contractors
- Can claim statutory entitlements

Contractor/Temporary v Permanent Worker...

Contract/Temporary Workers:

- Operate as either PAYE, Limited Company or via an Umbrella Company
- Must sign and return a contract before commencing work for the client
- Submit timesheets in order to get paid (normally on a weekly or monthly basis) that have to be approved by the client before any payment can be made
- Do not get paid for holidays (unless they are a PAYE temporary worker and in this case need to request their leave)
- Do not get paid sick leave
- As contractors/temporary workers are a flexible workforce, the client is not required to give any notice to the contractor (although normally there is a 2 week notice period offered unless the termination is due to performance)
- PAYE worker's accrue holiday days, if they work an average a 37 hour week, they will accrue holiday at the rate of 0.6 days for each week worked

Remember...

- Contractors are not employees of the client
- They are employed on a Contract for Services
- The client has no contractual relationship with the Contractors
- Site H&S to be conducted by the client
- Any holiday, sickness or termination queries should be directed to the agency

Don't...

- Set Objectives
- Conduct Appraisals
- Devise Development Plans
- Conduct Reviews
- Offer Training, unless it is a requirement of the post they were sourced for
- Include Contractors in Succession Planning or nominations to attend development workshops
- Discuss pay reviews directly with the Contractor



- Conduct any Disciplinary meetings directly with the Contractor
- Terminate a contract directly with the Contractor

