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Responding to the
Agency Workers Regulations 2010

**An overview for employers
from Brightred Resourcing Limited**

Introduction

The Agency Workers Regulations 2010 (the Regulations) were published at the start of 2010 and are in force from 1 October 2011. Government guidance is also available and aims to help both hirers of agency workers and the recruitment sector to understand the Regulations and the implications and responsibilities for both hirers and temporary work agencies.

The Government estimates the cost of the Regulations could be £1.7–1.9 billion per year. Whilst employers try to mitigate the impact in their particular organisations, the most likely areas in which increased costs of agency labour may arise include:

- increased pay/benefits, the extent of which will depend on the differential in pay and other terms between agency workers who accrue 12 weeks or more service and comparable employees. In addition, there may be increased costs arising from the access to collective facilities provisions
- indirect costs relating to new processes to manage compliance, avoiding unintentional breaches of the Regulations, keeping and sharing information, new ways of working with employment agencies
- the less obvious and immediate impact in terms of a closer fusion between agency workers and employees with potential employment status implications (whether real or perceived)

This document is intended to highlight key aspects of the Regulations for employers and how they are likely to apply in the workplace, taking into account the Regulations themselves as well as the Guidance. For ease of reference it is presented in a 'Questions and Answers' style format, identifying the most common employer queries. At its conclusion and to aid forward planning, we have included some practical options for employers considering how to respond to the Regulations.

If you require any further information, please don't hesitate to contact us.

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The key changes introduced by the Agency Workers Regulations

Set out below is a series of questions and answers which seek to explain the impact of the Regulations in frequently encountered situations (with simple 'at a glance' tables).

Please note: the Agency Workers Regulations (the Regulations) adopt the term 'agency worker' throughout, so the same terminology is used below, along with 'hirer', to mean the hiring company or end-user.

Who is an agency worker?

Q1. Across our organisation we use a wide variety of workers including contractors, agency temps, consultants and freelancers. Which of these is protected by the Regulations?

From 1 October 2011, protection exists where an individual is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer. Agency workers supplied via intermediaries (such as master and neutral vendors and so called 'umbrella' companies) are also protected. However, the genuinely self-employed do not fall under the Regulations and are not protected, providing they are genuinely operating in business on their own account, in a business to business relationship with the hirer – whether that is as sole traders, through limited liability companies or self-employed partnerships.

Applying the provisions of the Regulations to the above question, it will depend on the circumstances and for example, whether the contractors, freelancers and consultants are genuinely self-employed. If they are not, they may be protected even where their contract is with the your business and not with a temporary work agency.

Where relevant, it is important to bear in mind that inter-group transfers of staff, where a worker is hired by various companies in the group or where one group company hires the worker via an agency and the worker then performs work for various companies in the group, are likely to be caught by the Regulations where the most likely explanation for the arrangement is an intention to avoid the Regulations. Secondment or loan arrangements are unlikely to be subject to the Regulations.

Summary of protected agency workers

Status of individual	Protected?
Supplied by temporary work agency	Yes
Supplied by intermediaries (eg umbrella companies)	Yes
'Sham' self-employed or Managed Service Contracts	Yes
Genuinely self-employed (contractors, consultants, freelancers)	No
Genuine Managed Service Contracts	No
Secondments	No



Equal treatment

Q2. Do agency workers qualify for 'equal treatment' with permanent employees under the Regulations?

No. Reference to 'equal treatment' under the Regulations is a convenient, though somewhat misleading, shorthand for what the new legal rights mean. In summary, the Regulations do not entitle agency workers to full equality and do not impose an employment status between the agency workers and the hirer. In other words, they do not create a contract of employment with the agency worker.

A 12 week qualifying period applies before most (but not all) of the Regulations' benefits accrue and, thereafter, 'equal treatment' is limited to defined basic terms and conditions of work only.

After the qualifying period, agency workers must be afforded the same basic working and employment conditions as they would have received had they been directly recruited by the hirer to do the same job as an employee or a worker. This encompasses, for example, such key terms as pay, working time and holiday entitlements but excludes most payments normally associated with employment status, such as company sick pay and redundancy pay. Certain types of bonus payment, directly attributable to the quality or quantity of work done, are payable to an agency worker (see also Q3). An agency worker may also be eligible for some fixed cash benefits, such as luncheon vouchers.

The Regulations specifically exclude agency workers from any pension payments. Hirers nonetheless need to be aware that new pension rights are being introduced under the Pensions Act 2008 from 2012 and will apply to agency workers.

The last government stated that the right to equal treatment as regards pay enables consideration of pay as a whole so that, where the total pay 'package' of an agency worker is at least the same as the employee with whom they are comparing themselves, there may be no breach if certain other benefits or payments are excluded. There appears to be a number of reasons why such an approach is not correct or compatible with the Regulations, not least that the Regulations refer to 'the same' pay and benefits and also contain no apparent defence for hirers providing 'broadly similar' terms, nor any right to set-off more favourable terms. It seems likely, therefore, that even where agency workers are in receipt of some more favourable terms (were this to arise) they must nonetheless receive equal pay and benefits in other areas, potentially placing them at an overall advantage. It would be hoped, however, that in the context of a tribunal claim, a tribunal would allow the hirer or agency credit for aspects of the overall package where the agency worker was better off.

In addition to equal basic employment conditions, agency workers have the right to equal access to certain employee facilities (for example, the canteen) and to information about vacancies, if these are available to the hirer's employees or workers (see further Q9 and Q10 below). Note, however, that these two latter rights are immediately available from day one of the assignment.

Summary of relevant pay and benefits

The table below identifies some of the more straightforward items falling within the definition of 'pay' or required benefits, but is not exhaustive.

Nature of pay/benefit	Agency worker entitlement?
Basic salary	Yes
Holiday (normal entitlement for employees)	Yes
Rest breaks/restrictions on night work	Yes
Company sick pay	No



Redundancy pay (statutory or enhanced)	No
Maternity/paternity/adoption pay	No
Pension	No*
Long-service or loyalty bonus	No
Piece-work production target bonus	Yes
Luncheon vouchers	Yes
Access to on-site canteen or childcare facilities	Yes (but not if can justify – Q11)

*Separate provisions under the Pension Act 2008 will afford pension provision to agency workers from 2012.

Q3. We operate a bonus scheme for our employees but do not open this up to agency workers. Must we do so?

Certain bonuses are included under the Regulations' equal treatment principle and must be extended to agency workers. For example, a bonus directly attributable to the amount or quality of the work done is likely to be included, such as might arise for piece-work, whereas a bonus given solely to reward loyalty or long service may not. There is a specific exception for financial participation schemes (a scheme that distributes shares or options or a profit share scheme which distributes cash/shares). Therefore, answering this question will involve looking at the detail of, and the reasons for, the bonus.

Bonus schemes which operate with reference to both personal and company performance may prove particularly difficult. Whilst the Guidance suggests that such schemes may often fall in whole or in part within the definition of 'pay', in practice this will depend upon the rules of the particular scheme and how easy it is to identify the corporate and individual elements.

Note that a hirer can attach the same conditions to payment it does with other employees (for example, service criteria or still being engaged on the date the bonus falls due).

Q4. It would be far simpler for us if we could pay agency workers for some of their holiday entitlement, in lieu of them taking leave. Can we do that?

Agency workers accrue rights to statutory minimum holiday entitlement set by the Working Time Regulations 1998 (28 days for a full-time worker) from the first day of assignment. The Agency is responsible for holiday pay in respect of such minimum entitlement. Any additional contractual leave entitlement accrues after the 12 weeks qualifying period. The Agency's ability to pay in lieu of untaken holiday holiday, over and above the statutory minimum, offers a pragmatic solution to a potential administrative headache, particularly where agency workers are engaged by multiple hirers. The Regulations do not expressly permit the rolling up of holiday pay in the hourly rate. However, this would seem to be permitted in relation to the contractual element and is referred to in the Guidance. Rolling up is unlikely to be possible for the statutory element as to do so would deny agency workers the opportunity of taking the leave from the outset.

At the end of an assignment it appears that agency workers may be paid in lieu for accrued but untaken holiday in the same way that the Working Time Regulations allow for this for employees.



Nature of pay/benefit

Q5. Can agency workers contract out of the Regulations?

No, this is expressly prohibited. Furthermore the Regulations provide for a fine of up to £5000 for avoidance arrangements which are designed to prevent the 12 week qualifying period being met; for example, were a hirer to intentionally rotate agency workers through substantively different assignments to break continuity. However, these anti-avoidance provisions only bite when the worker has completed two or more assignments or roles with the hirer or with connected hirers (they are connected where, for example, the first hirer has control of the second) and potentially require tribunals to investigate hirers' motives where assignments raise suspicion.

Comparators

Q6. Can an agency worker use an employee in another office or at another location as a comparator for 'basic terms and conditions'?

Yes. The starting point for determining what basic terms the agency worker is due under the Regulations requires the hirer to consider what terms it would have offered ordinarily, had he/she been recruited as an employee or worker to do the same job (the 'as if' test). In other words, what pay and holidays would he/she ordinarily be offered, given his/her particular skills, qualifications and the role, had he/she been employed, or engaged as a worker, from the outset? This may be a straightforward question to answer where the hirer operates clear grading and pay scales. More often than not, however, the answer will not be immediately clear. This is where the use of a comparator is of assistance.

A comparable employee ('comparator') under the Regulations may be identified beyond the agency worker's immediate place of work if there is no employee undertaking the same or broadly similar work to that of the agency worker at that office or location. In that event, an agency worker may identify a comparator who works or is based at a different establishment, provided they otherwise satisfy the comparator criteria.

Who is a comparator?

	Comparator for basic T&Cs (Q6)	Comparator for access to vacancies (Q9)	Comparator for access to facilities (Q10)
Employee only	Yes*	No	No
Employee or worker	No	Yes	Yes
Working for and under the supervision and direction of the hirer	Yes	Yes	Yes
Engaged in same or broadly similar work**	Yes	Yes	Yes
Based at same establishment	Yes	Yes	Yes
Based at different establishment	Yes	No	Yes
Must still be employed/engaged	Yes	Yes	Yes

The Regulations provide that the hirer will be deemed to have complied with equal treatment in relation to basic terms where the agency worker is engaged on the same terms as a comparable employee,



providing that comparator's terms reflect typical contractual terms in the hirer's organisation.

For further information on who is a comparable employee for these 'deemed compliance' purposes (there are three different definitions of comparator in the Regulations), please see the table above. In this instance, comparison across different locations and offices is permitted.

* The 'as if' comparison can be made with both employees and workers, but, confusingly, the comparator for deemed compliance must be an employee.

**Qualification and skills can be taken into account, where relevant.

Qualifying period

Q7. Does an agency worker have to accrue the 12 weeks qualifying service with the same agency?

No. The way in which the Regulations are drafted means that qualification for equal basic terms and conditions is dependent on 12 calendar weeks' service in the same role with the same hirer (as opposed to with the same agency). As service accrues in calendar weeks and not by hours worked, an agency worker working with different agencies who each place him with the same hirer in the same role for just one day per week (perhaps for only an hour or so) in a 12 week period, will qualify for 'equal treatment'. In practice, this requires hirers to keep much better records of agency worker placements and also to share that information between each other, notwithstanding administrative difficulties and costs.

Q8. What happens if the agency worker falls ill or fails to complete a full 12 weeks for that or some other reason?

The right to equal treatment in basic terms and conditions is only be triggered when the agency worker has accrued 12 continuous calendar weeks' service in the same role. But, in deciding whether service has been 'continuous', the Regulations provide that a break between assignments of 6 weeks or less shall not break continuity for qualification purposes when the worker returns to the same role with the hirer.

Continuity is broken in the event of any break of more than 6 weeks during or between assignments in the same job. Continuity is also broken upon commencement of a new and substantively different role and where the agency has informed the worker in writing of the new work type. In either case the 12 week qualifying period will be reset (subject to the anti-avoidance measures referred to in Q5 above).

However, there are a number of circumstances where absence will pause the qualifying 'clock', rather than reset it to zero. One such example is sickness absence. Where agency workers are absent due to (medically certified) sickness absence, the qualifying period resumes on their return to work – providing this occurs within 28 weeks. Another example is where there is a planned and customary workplace closure at the hirer, such as a summer or Christmas shutdown or in the event of industrial action. Time off for holiday and jury service is also included.

The position is different in the case of pregnancy and maternity related absence, maternity leave, adoption leave and paternity leave. In such circumstances, the qualifying period is not paused but is deemed to continue to run for the original intended duration of the assignment or likely duration (whichever is longer).



Consequences of absence on qualifying period – some examples

Circumstance of absence Effect on continuity of 12 week qualifying period

Illness or injury	Paused (for up to 28 weeks)
Public duties (eg jury service)	Paused
Planned workplace closure	Paused
Industrial action	Paused
Annual leave	Paused
Pregnancy related sickness	Continues to run

Access to information about vacancies

Q9. Our organisation posts any job vacancies on specific pages of an intranet according to job type but these pages are not generally accessible to agency workers. Do we need to take further steps to bring any such vacancies to the attention of our agency workers?

Agency workers are entitled, from day one of an assignment, to be informed by the hirer of any relevant vacant posts in the organisation, to give them the same opportunity as a comparable employee or worker to find permanent employment. For further information on who is a comparator, please see the table at Q6.

Agency workers must therefore have the same access to information regarding vacancies posted on the hirer's intranet or notice boards as their comparator and should be included in any additional steps taken to advertise a position internally (for example, use of e-mail, newsletter, etc). The inclusion of the word 'relevant' means that a hirer would not normally be obliged to inform, say, an administrator, of a director level vacancy.

The Guidance makes clear that there are no vacancies (and therefore no breach) where a hirer is carrying out an internal reorganisation and there is a headcount freeze.

Access to facilities

Q10. As an organisation we operate a childcare facility for staff. There is currently a waiting list of 6 months. Must we make any special provision for agency workers?

The Regulations provide that, from day one of an assignment, an agency worker must be treated no less favourably than a comparator in relation to access to collective facilities, such as child care facilities, unless this can be justified on objective grounds. For further information on who is a comparator, please see the table at Q6. Provided that agency workers are given the same access to the hirer's waiting list as permanent staff, it will comply with this requirement, despite the reduced opportunity for reaching the top of any waiting list. Note that in addition to childcare facilities, similar rights exist in respect of other collective facilities and amenities including transport and canteen facilities (see table below). Cost alone is unlikely to present a legitimate ground upon which to justify refusal.

A non-exhaustive list of facilities identified in the Guidance includes:

canteen or similar facility**	waiting room
workplace crèche	mother and baby room
transport services	prayer room
toilet/shower facilities	food and drinks machines
staff common room	car parking

** right is to access, not necessarily to subsidy



Liability

Q11. Who is liable if a qualifying agency worker believes he or she is receiving less favourable treatment than comparable employees doing the same job?

Initial responsibility for ensuring equal treatment for agency workers after 12 weeks lies with the agency. It is extremely important, therefore, that agencies pursue and then review the job information provided by the hirer. The Regulations specifically provide for agencies to obtain (or take reasonable steps to obtain) relevant information from the hirer about the basic working and employment conditions they apply and details of any comparable employee. The Guidance emphasises the need for exchange of information between agencies and intermediaries, workers and agencies (where there have been previous assignments with a hirer) and between hirers and the agencies. Where the agency has done this and has acted reasonably in setting appropriate conditions for the agency worker, once the qualifying period has ended, liability for breach will be likely to lie with the hirer. An employment tribunal is otherwise able to apportion blame if it considers more than one party is at fault.

Liability in relation to access to facilities and information about vacancies (see Q9 and Q10) is the sole responsibility of the hirer.

In addition, agency workers are protected from any detriment, caused by the hirer or agency, on the grounds that they brought proceedings or contributed to another workers' proceedings, requested a written statement (see Q12) or otherwise asserted their rights under the Regulations. Expect some agency workers to try and use this protection where an assignment is ended against a backdrop of disagreement and acrimony (even where such acrimony has no connection with their Regulation rights).

There is no maximum limit to any compensation awarded to successful claimants but a minimum award of two weeks' pay should normally be awarded by the tribunal in relation to a failure to provide equal terms and conditions.

Claims

Q12. If an agency or hirer receives a complaint from an agency worker who believes they are receiving less favourable terms to comparable permanent employees, how should they respond?

On completion of the qualifying period and providing the assignment is ongoing, an agency worker is entitled to lodge a written request with the agency for:

- relevant information relating to the basic working and employment conditions in force in the hirer
- the factors the agency considered when determining the basic working and employment conditions applicable to the agency worker, and
- in certain circumstances, the basis on which a comparable employee was identified and the relevant terms and conditions applicable to that comparable employee/worker.

A written statement containing this information must be provided by the agency within 28 days of its receipt of the written request. If it is not, after 30 days of making the request the agency worker may instead refer a request to the hirer, seeking a written statement containing information relating to the relevant basic working and employment conditions of the hirer's workers. Again, a response time of 28 days applies to the hirer.

If a complaint cannot be resolved by the above means, or by agreement between the parties, an agency worker may bring a complaint in the employment tribunal regarding the alleged less favourable treatment, however requesting a written statement is not a precondition to bringing a claim. The tribunal may draw inference from any failings on the part of the agency or hirer (as applicable) to provide the relevant requested information.



If a complaint refers to an alleged failure to allow access to the 'day one' rights (access to collective facilities and to information about vacancies), a similar mechanism is provided for the agency worker to direct any written requests for relevant information to the hirer.

The hirer is solely liable for these matters (see Q11).

Summary of information requests from agency worker

Step 1	To whom	For what	Response time
Agency worker submits written request	Agency	A written statement relating to the basic working and employment conditions in force in the hirer	28 days from receipt by the agency

If no response within 30 days of making the request:

Step 1	To whom	For what	Response time
Agency worker submits written request	Hirer	A written statement relating to the basic working and employment conditions in force in the hirer	28 days from receipt by the hirer

Other changes introduced by the Regulations

Q13. Are there any other changes introduced by the Regulations of which employers should be aware?

Yes. The Regulations add to the list of information that must be given during collective redundancy, TUPE and some other statutory consultation. Specifically, when disclosing written information to worker representatives for the purposes of consultation, hirers are additionally required to state the total number of agency workers engaged, the areas of the business in which they are engaged and the type of work they are contracted to undertake. In addition, there is a requirement to disclose information regarding agency workers to recognised unions for collective bargaining purposes. The Regulations also provide a right to paid time off for ante-natal appointments and consolidate other health and safety duties in relation to pregnant and new mothers. For instance, there is a duty:

- to provide reasonable alternative work where a pregnant agency worker could not for a health and safety reason fulfil her role, and
- pay her for the duration of that assignment if no such alternative exists.

Implementation

Q14. Where an agency worker has already worked for the organisation for more than 12 weeks in the same role, do they immediately qualify for equal treatment from 1 October 2011?

The Regulations are in force from 1 October 2011. However, time spent by an agency worker on assignment before that date does not count towards the 12 week qualifying period. Counting 12 weeks forward from the date of implementation results in the week commencing 25 December 2011 as the earliest date for qualifying for equal treatment.



Responding to the agency workers regulations: options for hirers

Analyse the organisation's use of agency workers

As a first step, it is suggested that hirers fully understand their current (and future) needs for agency workers and the costs associated with meeting this need. Such analysis will better inform how the organisation can or should respond to the Regulations. Amongst other information, the assessment should identify the number of workers involved, the reasons for their use, costs, the nature of any contractual commitments with agencies (including notice clauses) and the practical process by which agency labour is hired (including who decides when and how agency workers are engaged). The latter information is important given that many hirers will centralise decisions over the use of, and pay and conditions for, agency workers going forwards, in order to manage compliance with the Regulations.

Identify pay and holiday differentials

In addition to collecting information on the organisation's use of agency workers, hirers should assess pay and holiday differentials between agency workers and comparable employees to clarify the risk of future equal treatment claims, including any 'hot spots' where differentials are high. Identifying collective facilities offered by the hirer, and the impact of permitting access to them by agency workers, as well as considering how the right to access information on vacancies could be handled, should also form part of this exercise.

Some options for hirers

From our work with clients, we believe that the majority of hirers do not use agency workers as a device to avoid employment protection legislation. They do so as they need flexible labour and in the UK there are around 1.3 million workers who are ready to provide that labour. But, given the changes introduced by the Regulations, hirers do now need to review their options when responding. To help inform such a review, we have set out some potential options below in the expectation that hirers will consider such issues 'in the round', including assessing their impact on fairness and employee relations more generally, before deciding on the best approach for their organisation.

1. Terminate all agency worker contracts at 11 weeks and ensure there is an effective break of more than 6 weeks to 'stop the clock' on qualifying period.

While this option works in theory, it may not be manageable in practice and risks breaching the anti-avoidance provisions which are aimed at penalising hirers where they intentionally structure assignments to avoid the Regulations (see Q5); for example, should an agency worker return a third time to the same role having been terminated at 11 weeks on two previous occasions with 7 week intervening gaps. As a result, rigorous processes would need to be in place to avoid an inadvertent breach of these provisions. Hirers tempted by this option should also remember the right of access to collective facilities and information about vacancies (Q9 and Q10 above) which would still apply from day one of the assignment. Finally, successive assignments in the same role could suggest a medium term staffing need. If so, the cost of repeated training of new agency staff and the administrative burden associated with this approach may push hirers to consider an alternative solution, such as fixed term employment.

2. Reduce reliance on agency workers by setting up an in-house 'bank' of casual workers or directly recruiting temporary workers to address flexible labour demands.

Such in-house arrangements fall outside the scope of the Regulations, unless the most likely explanation for any such arrangement is an intention to avoid the Regulations, in which case it may be open to challenge (see Q1 above). In any event this should not be embarked upon lightly given the practical, legal and employee relations issues. In principle, while it is possible to offer lower terms to in-house flexible labour (when compared to permanent employees), in practice, equal pay, discrimination laws and other legal protection will limit the degree of flexibility. Many hirers do not want the burden of sourcing such labour and there might be headcount constraints. In addition, hirers would need to manage their employment and worker rights and tax status, for example, unfair dismissal and redundancy rights for those with employee status.

3. Set up a master/neutral vendor agreement with one agency.

While such an arrangement is not exempt from the Regulations, it does provide a single point of contact for sourcing agency workers. This offers greater simplicity and can make sense from a risk management perspective, by streamlining the sharing of information, as well as sharing the burden of compliance.



In addition, it may present an opportunity for hirers to re-negotiate rates. In order to benefit from this arrangement, hirers need to set up of effective processes with the agency to share information, for example, around benchmarking comparators, to track the 12 week qualification period and to identify the period for potential claims to be brought. Importantly, data protection and confidentiality provisions should also be agreed with the agency, together with possible indemnities in the event of a breach, given the degree of personal information that could be shared between the parties.

4. Consider using 'managed service contracts' (MSC) for the delivery of certain services.

A MSC provider will be responsible for delivering an entire service for a client (such as catering), will supervise and direct the workers itself and, as such, the workers do not fall under the scope of the Regulations. This will usually only work in circumstances where the hirer is comfortable with a third party managing staff or operations and may be suited to activities which are not business critical.

5. Consider the 'managed service contract plus' option.

Taking the above MSC approach further, where a hirer has regular and high use of agency workers in a defined service area, it might decide to set up an 'in house' MSC. Existing agency workers are offered employment with the hirer and, as employees, have no entitlement under the Regulations (similar to option 2 above). Alternatively, the hirer could set up a new company in- or outside the hirer's corporate structure and the 'NewCo' would employ the agency workers and offer their services back to the hirer on a MSC basis. One advantage of the 'in house' or 'NewCo' MSC approach is that it puts, on a clear basis, the terms on which the former agency workers are engaged without the burden of sharing information with an external agency. However, it also brings with it employment or worker status rights and legal protection. Further, if the hirer assumed 'control' of the staff, the MSC exception would no longer apply and the 'New Co' would probably be acting as an agency itself.

6. Negotiate contracts with genuinely self-employed individuals or limited company contractors.

Such individuals are not protected by the Regulations, providing they are genuinely operating in business on their own account. For some sectors already used to sourcing freelancers and the like, this may be an easier option. However, it does involve an administrative burden and may not be deemed worthwhile where there is a low risk of any claim under the Regulations (for example, where agency workers' total compensation is typically higher than comparable employees).

7. Explore the 'Swedish derogation' with an agency.

The Regulation's equal treatment pay provisions do not apply if the agency employs the worker on a permanent contract. This is known as the 'Swedish derogation'. There are some conditions, for example, the level of pay between assignments should be at least 50% of on-assignment pay and not below the national minimum wage. Realistically, this will only be viable for an agency where their margin is higher, to offset the risk of work not being available at certain times, or where work is plentiful.

8. Identify exclusive agency worker roles.

With this option, the potential argument under the Regulations is an absence of comparable employees in the organisation who do the same or similar job as the agency worker. For example, where agency workers occupy specific roles exclusively, with no comparators for the purposes of equal treatment. However, this 'exclusivity' must stand up to scrutiny; merely placing labels on roles or grades will not suffice. Given that agency workers can seek comparators in different work locations, this approach must also be capable of defence beyond individual workplaces. This interpretation of the Regulations is also literal in approach and there is a risk that tribunals may simply disagree and extend the equal treatment right to such 'exclusive' agency workers

9. Manage the risk over time.

For those hirers with a low risk profile under the Regulations, for example, where the use of agency workers is limited or the pay differential is insignificant, adopting a 'wait and see' approach may be pragmatic.

10. Live with it.

Many organisations may conclude that working with the Regulations is a better option. In order to do so effectively, however, prudent hirers will have reviewed carefully their staffing needs and where agency labour can be engaged most effectively and economically.



Glossary of terms

Managed service contracts

this is a form of sub-contracting. Typically, the hirer sub-contracts an activity (eg IT or catering) to another organisation, and that organisation may use agency workers to perform the activity and, importantly, it supervises and controls them, rather than the end user. Therefore, the end user is contracting for a service or output, rather than hiring individual agency workers to work under their supervision and direction.

Umbrella companies

the following is the accepted definition of an umbrella company, according to BIS: 'An umbrella company is where the worker has an overarching employment contract with the company and all of the worker's income is treated as employment income. Workers are not a director and nor do they own any shares in the company. The worker works for end clients but rather than working directly for them, he or she provides their services through the umbrella company. The umbrella company does not source the engagements; in some cases the worker sources the engagements directly and in other cases an agency (employment business) will source engagements. In the latter case, the end client pays the agency (employment business), which deducts its fee and in turn pays the umbrella company for the worker's services. Generally many workers will provide their services through the same umbrella company. From the amount paid by the agency the umbrella company will deduct its fee. It will then calculate tax free expenses due to the worker before deducting the income tax and NICs due on the remaining sum and paying over the net amount, plus tax free expenses, to the worker. It may also retain a regular sum to be paid later as holiday pay.

Master/neutral vendors

master vendor arrangements exist where a hirer appoints one agency to manage its recruitment process and that one agency sources the workers itself and uses other recruitment agencies as necessary ('second tier' suppliers) to supplement on a sub-vendor basis. Neutral vendors do not supply staff themselves, but simply coordinate the supply of staff from the 'second tier' suppliers.

'Swedish derogation'

there is a derogation from the Regulations whereby the agency employs the worker on a permanent contract and such individuals are not entitled to equal pay under the Regulations. There are some important conditions in order to take advantage of the derogation and these must be made clear in the contract.

