

A guide to the Agency Workers Regulations 2010.

EMPLOYMENT DEPARTMENT

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On 1 October 2011, the Agency Workers Regulations 2010 came into force. The Regulations give temporary workers ('temps') some of the same rights as employees hired directly by the end user of their services.

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The Regulations protect workers who are supplied to work for a third party by a temporary work agency, providing they are employed by the agency or work under a contract for services (whether for the agency or the hirer). The fact that they provide their services through ‘intermediaries’, such as umbrella or personal service companies, will not necessarily take them out of scope of the Regulations.

What is a ‘temporary work agency’?

The definition of temporary work agency is wide. It includes anyone who engages in the economic activity of supplying individuals to work temporarily for a third party. Therefore, if a business sets up a subsidiary company within their group to bring the supply of temporary staff to other group companies in-house, that subsidiary company will come into the scope of the Regulations.

It also includes anyone who is responsible for paying for (or receiving or passing on payment for) the services of individuals to work temporarily for hirers – in other words, umbrella companies, managed service companies, or personal service companies.

Will secondments be covered?

The guidance to the Regulations produced by the government suggests that secondments will not fall into the scope of the Regulations, on the basis that

“this is usually where the main activity of the organisation seconding the individual is not the supply of individuals to work temporarily under the supervision and direction of another party”.

However, it should be noted that the Regulations themselves do not state that the supply of individuals needs to be the main activity of the agency. As the guidance is not binding, secondments could, therefore, be within the Regulations’ remit.

Who will not be covered?

The Regulations will not apply to workers supplied under managed service contracts (essentially, outsourcing arrangements), or to the genuinely self-employed.

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Temps will have:

- ‘day one’ rights;
- rights which accrue after completion of the qualifying period of twelve weeks; and
- certain rights relating to pregnancy.

What are ‘Day One’ rights?

Rights which apply from the first day of placement are:

- (a) the right to be given information about permanent employment opportunities with the hirer. Notices or announcements in a public place (such as in staff canteens or on the intranet) should suffice, providing temps are given equal access to these facilities at the same time as other ‘comparable’ staff members; and
- (b) the right to be given access to on-site facilities and amenities (such as crèches or canteen facilities). It should be noted, however, that the Regulations only give the same rights as comparable workers, so if hirers impose minimum service requirements before allowing access to the facility or amenity, this will apply to temps as well. If there is a waiting list system in operation for certain amenities, temps will be allowed to join but not by-pass this waiting list.

What are ‘twelve week’ rights?

After completing a twelve week qualifying period, temps will have the right to the same basic working and employment conditions as are ordinarily included in the contracts of comparable workers recruited directly by the hirer.

Basic terms include pay, length of working time, rest periods, rest breaks and annual leave. They will not include such terms as the provision of private healthcare or contractual notice periods.

What does ‘pay’ include?

‘Pay’ here includes holiday pay, overtime, shift allowances and bonuses for individual performance (including commission and other formulaic bonuses, payable by reference to productivity or performance). However, ‘pay’ does not include payments to reward loyalty or long term service. Therefore, agencies do not need to match participation in long-term incentive schemes, share option or profit sharing schemes. ‘Pay’ also does *not* include occupational sick pay, pension payments, redundancy and maternity pay.

What terms are ordinarily included?

Given that the Regulations cover terms that are ‘ordinarily included’ in comparable contracts, temps will be able to enjoy equality not only in relation to express contractual terms, but also terms implied by custom and practice or incorporated in employee handbooks or collective agreements.

What are the rights relating to pregnant workers?

Temps who are pregnant will be entitled to paid time off to attend ante natal appointments, and hirers will need to make adjustments to provide a safe place of work. However, if a hirer is unable to provide a safe place of work for a temp, the agency must offer appropriate alternative work to the temp (on terms which are not less favourable) for the duration of the original assignment. If no such vacancy exists, the agency must pay the temp for the duration of the assignment.

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The twelve week clock runs continuously if temps work for the same hirer in the same role on one or more connected assignments without a break. Breaks of up to six weeks will not reset the clock. If, however, a new assignment with the hirer begins during the twelve week period and the whole or main part of the work or duties in the temp's role are substantially different from the previous assignment, the clock will reset, provided that the agency informs the worker in writing of the changes to the role.

Given the fact that the twelve weeks continue to accrue for temps working on successive assignments with the same hirer, agencies would be well advised to check with the temp to find out whether they have worked with the hirer before and, if so, in what capacity.

The twelve week clock will continue to run if the temp is absent due to annual leave, or they are absent due to pregnancy, childbirth, maternity, paternity or adoption leave.

The clock will be stopped but not reset if the break is up to six weeks long, there is a strike, or if the temp is absent due to sickness or jury service of up to 28 weeks.

If an agency deliberately structures assignments in such a way as to reset the twelve week clock, temps may be entitled to an additional award of up to £5,000.

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If the hirer or agency can point to an actual comparator who is doing broadly similar work in the same business and enjoys the same basic terms as the temp, the Regulations will be deemed to have been complied with.

Therefore, if a temp secretary attempts to bring a claim on the basis that a permanent secretary earns considerably more money, the claim would be defeated by showing that another permanent secretary doing similar work earns less than the temp.

If the temp is one of a kind within the business, no right to equal treatment arises (save in relation to terms common to the whole workforce).

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In order to allow the agency worker to discover whether they may have a claim, the temp is entitled to submit a written request for information to the agency regarding:

- the hirer's basic working and employment conditions;
- how the temp's terms and conditions were determined after the qualifying period; and
- the basic working and employment conditions that apply to comparable employees.

The agency has 28 days to comply with the request. If it fails to do so, the temp may then request this information directly from the hirer, who then also has 28 days to comply.

Temps can also request information relating to their 'day one' rights from hirers (without having to ask the agency first).

As with discrimination questionnaires, a failure to respond or an inadequate response to an information request from a temp does not itself give rise to any remedy or compensation. However, the Tribunal is entitled to draw an adverse inference from the failure.

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The provisions relating to equal pay will not apply in cases where temps are employed by an agency on a so-called 'derogation contract'.

For a derogation contract to be valid, the temp needs to be told that the contract will deprive them of the right to equal pay, and it should be entered into prior to the commencement of the assignment. The contract needs to set out the basis on which the temp will accept work (the number of hours and the rate of pay they would be willing to accept), and the agency must commit to trying to find them suitable work.

If the temp enters into the contract, they will be entitled to at least 50% of their basic pay (having regard to their last assignment) between assignments, after the end of the first assignment under the contract. The pay between assignments is subject to the National Minimum Wage. The contract may only be terminated once the agency has paid the temp for four weeks 'down time'. The agency will not be liable to pay in respect of a week if the temp refuses work which was offered in accordance with the terms of the contract. This exception, the so-called 'Swedish derogation', is not common in the UK, but may become more so.

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The Tribunal will apportion liability for any failure to comply with the Regulations based on the extent to which the agency or the hirer is in breach.

As only the hirer is in a position to provide the temp with his or her 'day one' rights, the hirer will be liable if, for example, it fails to provide the temp with access to information about vacancies.

The primary liability for a failure to provide a temp with their twelve week rights lies with the temporary work agency. This is usually the recruitment business, but could also be the umbrella company or the service company through which the temp is providing his or her services (all of which count as 'temporary work agencies' for the purposes of the Regulations).

However, the temporary work agency may escape liability if it can show that it took reasonable steps to obtain the information required to comply with its obligations, and acted reasonably in using this information when determining the terms and conditions of the temp following the qualifying period.

If it can show that it tried to get the correct information, the liability passes to the next person in the chain – often, the hirer. However, if the umbrella company can show that it asked the recruitment business for, and the recruitment business failed to provide, the correct information, the recruitment business will be liable.

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Claims under the Regulations will be heard in the Employment Tribunal and must be brought within three months (unless the Tribunal considers it just and equitable to extend the deadline).

If a temp brings a claim against either the agency or the hirer, but not both, the Tribunal may use its powers to join the agency or hirer (as appropriate) if it considers that the claimant may be disadvantaged. Therefore, if it appears to the Tribunal that the hirer, and not the agency, is at fault, it is likely to join the hirer to the proceedings.

Temps are also protected from victimisation as a result of asserting rights under the Regulations. If they are an employee of the agency and are dismissed because they have asserted their rights, the dismissal will be unfair.

The Tribunal has a number of remedies at its disposal. It may award compensation, and/or make declarations and recommendations to agencies and hirers. While injury to feelings awards are expressly excluded for failures to provide day one or twelve week rights, the Regulations are silent as to whether they are available in cases of victimisation.

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The Regulations also contain a number of other amendments to existing legislation. These deal mainly with the representation of temps in a business's workforce.

For instance, temps will form part of the agency's (and not the hirer's) staff for purposes of determining the numbers of workers employed for statutory recognition procedures relating to trade unions, and the threshold applicable to information and consultation obligations.

'Suitable information' must also be given to appropriate representatives under TUPE, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Information and Consultation of Employees Regulations 2004. 'Suitable information' means information relating to the number of temps engaged by the hirer; the type of work being carried out by the temps and the areas of the business in which they are working. Interestingly, the obligation under TUPE is to provide information to the employee representatives, as opposed to amending the employee liability information provisions which require information to be passed between transferor and transferee. Accordingly, the transferee cannot complain to the transferor under Regulation 12 of TUPE if they are not given information about any potential liability relating to temps, and it is unlikely that the employee representatives will be overly concerned with the rights of temporary workers when in consultation about their own roles.

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The Regulations are likely to encourage more long lasting relationships between agencies and hirers, due to the information requirements. If a hirer is confident that an agency knows its business, it will ease the administrative burden of passing information.

The majority of temps are paid the same as, or more than a person recruited by the hirer. However, even if their salary is higher, they may be entitled to additional holiday and bonus, which will add to the costs of engaging temps.

Some industries are likely to be more affected than others. Construction and retail, for instance, will be more likely to use low cost temps (who will benefit from the equal pay provisions in the Regulations) than, say, financial services. The use of the Swedish Derogation may be more prevalent in these sectors, where agencies safeguard their margins by having a pool of derogated workers.

The average value of each individual claim under the Regulations is likely to be comparatively low - particularly when compared against the value of the commercial relationship between agency and hirer. This may mean that the agency will be more willing to assume liability for any issues raised by the temps it supplies - even if the hirer may technically be responsible.

The Regulations will almost inevitably cause hirers to consider their use of temps more carefully. They are more likely to look to flexible working arrangements within their existing workforce to cover seasonal demand, or to use more fixed term employees. However, this may not be practical for all businesses in all situations.

At one point in the development of the Regulations, there had been plans to amend the 'temp to perm' provisions of the Conduct of Employment Businesses and Employment Agencies Regulations 2003. These plans have now been scrapped. Given the fact that temps will now be entitled to be notified of any vacancy at the hirer, temp to perm fees could now be subject to even more intense commercial negotiation as the probability that a hirer will need to pay them will increase.

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The Regulations are likely to have a significant impact on the way that businesses use temps and the relationships businesses have with agencies. It is likely that agencies will feel that the government's promise to reduce the amount of red tape faced by business does not apply to them.

Shortly before the last general election, in March 2010, David Cameron tabled an early day motion calling for the Regulations to be scrapped and redrafted. Some saw this as an election ruse, as the reality was that the Regulations (and, in particular, the 12 week qualifying period) were the product of considerable and delicate negotiation. There have been reports in the media that David Cameron has also sought independent legal advice (circumventing Business Secretary Vince Cable), as to what, if anything, can be done to limit the effect of the Regulations. Nonetheless, the Regulations came into force on 1 October 2011.

Temping agencies and businesses alike are concerned about what effect the Regulations will have on the use of temps. There is a danger that the additional compliance burden will remove the flexibility provided by this sector of the workforce. Some commentators have predicted that the Regulations will be reviewed in a year's time. However, unless the unions can be persuaded that the Regulations have had a negative effect on the workforce, any amendments may be difficult to effect without major constitutional upheaval, as the Regulations come from Europe.

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