

# Agency workers



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## Introduction

The Agency Workers Regulations 2010 ("the Regulations") have had a significant impact on the temporary working industry in the UK.

This Inbrief summarises the Regulations and highlights the specific rights enjoyed by agency workers.

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## Overview of the Regulations

The term "agency worker" is frequently used loosely in the workplace to refer to a variety of contingent workers. However, in the context of the Regulations, an agency worker is a worker who is supplied by a temporary work agency to work temporarily for and under the supervision of a hirer. The best known example of an agency worker is a 'temp'.

The Regulations do not affect permanent employees, fixed term employees, casual workers, genuinely self-employed independent contractors/consultants, workers supplied and supervised by a managed service provider, or employees placed into permanent employment via a recruitment agency.

The type of relationship covered by the Regulations is a classic agency worker relationship where the agency worker has a contract with and is paid by the agency, not the hirer.

Agency relationships are often complex and, in addition to the agency worker, agency and hirer, may involve additional intermediaries such as umbrella companies and master / neutral vendors. The Regulations include provisions which seek to protect agency workers supplied through such arrangements. In this type of situation each party should take care to ensure that it identifies its own specific obligations under the Regulations.

The Regulations give agency workers two types of rights: rights that apply from day 1 of an assignment (Day 1 rights), and rights that only apply after a 12 week qualifying period (12 week rights).

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### Day 1 rights

From the start of an assignment, the agency worker has the right to:

- > Be told of relevant vacancies in the hirer's organisation. This may be by general announcement in a suitable place (for example a public noticeboard, the intranet, a newsletter, by round-robin email)
- > Be treated no less favourably than a comparable worker in relation to 'collective facilities and amenities'. This includes canteens, workplace creche, gym, transport (local pick ups and drop offs or transport between sites but not company car allowances or season ticket loans), car parking, prayer room, staff common room, shower facilities, mother and baby room. The agency worker cannot bypass any waiting list or membership fee – they just have the right to join the list or pay the fee.

Access need not be provided if a comparable worker would not have access, or if less favourable treatment can be objectively justified.

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### 12 week rights

After completion of a 12 week qualifying period, the Regulations give agency workers the right to the same basic working and employment conditions as if they had been recruited directly by the hirer to do the same job.

This covers terms and conditions relating to:

- > pay
- > the duration of working time
- > night work
- > rest periods and rest breaks
- > annual leave

In addition, pregnant agency workers who have completed the 12 week qualifying period are entitled to paid time off for antenatal appointments.

It is the agency, not the hirer, which is responsible for providing these terms and conditions to the agency worker. For example, it is the agency which is responsible for paying the agency worker. However, the hirer is required to provide certain information to the agency to enable it to provide the terms and conditions.

The test to establish equal treatment is: on what terms would the agency worker have been employed, had the hirer employed the individual directly?

In other words, the agency needs to determine (based on information provided by the hirer) what that particular worker would have been paid if the hirer had recruited him directly, taking into account his qualifications, skills, experience or expertise.

The test uses a hypothetical comparator. However, if the agency or hirer is able to show that the treatment of the agency worker is consistent with that of an actual comparator employee (doing the same or broadly similar work), it will be deemed to have complied with the Regulations.

### What does 'pay' mean?

The most significant entitlement that needs to be matched is 'pay'. The Regulations interpret that term widely as meaning all sums payable to a worker of the hirer in connection with the employment (subject to some specific exceptions). For example the following types of 'pay' need to be matched:



- > Salary / wages / pay
- > Commission
- > Holiday pay
- > Overtime
- > Shift allowances
- > Vouchers & stamps (if they meet certain conditions)
- > Gym membership (depending how it is provided)

Benefits that are not 'sums payable' or close in concept to pay are not 'pay' and need not be matched. For example:

- > Benefits in kind
- > Company car
- > % discounts
- > Insured benefits
- > Pension payments
- > Redundancy pay
- > Share or option schemes

Sick pay, maternity / paternity pay, and notice pay also need not be matched.

### Incentives and bonuses

Given the infinite number of incentive and bonus arrangements, this is one of the more complex areas of the Regulations. Broadly:

- > Incentives directly attributable to the amount or quality of work done by the agency worker (e.g. piece-work bonuses) must be matched.
- > Incentives that are not directly attributable to the quantity or quality of work done by the agency worker or which consist of a distribution of a share of profits, options or shares (e.g. team or company performance, Christmas bonus) need not be matched. But note that in schemes that reward 'mixed' performance (company, team, individual) the individual performance element may need to be identified and matched.

### Benefits in kind, vouchers and stamps

Benefits in kind are not 'pay' and need not be matched unless they are in the form of vouchers or stamps, which must be matched if they have a fixed value expressed in monetary terms or are capable of being exchanged for money, goods and/or services.

Childcare vouchers, in which a benefit in kind is funded on the basis of salary sacrifice

arrangements, need not be matched, because they do not reflect any overall increase in the amount of pay received. Instead the agency worker would be paid the full salary amount.

### The 12 week qualifying period

The right to equal treatment does not apply until an agency worker has undertaken the same role with the same hirer for 12 continuous calendar weeks, regardless of working pattern.

A new qualifying period will start if there has been a new assignment with a different hirer; a break of six or more calendar weeks between assignments; or a new role with the same hirer that is substantively different (and the agency has informed the agency worker in writing of the type of work they will do in the new role).

### Anti-avoidance provisions

The Regulations contain anti-avoidance provisions which give an agency worker the right to be treated as if they had met the 12 week qualifying period if a structure of assignments develops. Either or both of the agency or the hirer could also be fined up to £5,000.

### Assignment breaks

Normally a break of six or more weeks between assignments would prevent previous periods of work from counting towards the 12 week qualifying period. However, the Regulations contain special rules about certain types of absence when the period worked before the absence will continue to count towards the qualifying period:

- > Breaks of less than six calendar weeks
- > Up to 28 weeks' sick leave
- > Statutory or contractual leave (excluding maternity, paternity and adoption leave)
- > Up to 28 weeks' jury service
- > A customary, temporary workplace closure (e.g. summer/Christmas shutdown)
- > A strike, lockout or other industrial action at the hirer's establishment
- > In some circumstances the period of absence itself also counts towards the qualifying period:
  - > Absences relating to pregnancy, childbirth or maternity for up to 26 weeks after childbirth, if the assignment would otherwise have been ongoing.
  - > Statutory or contractual maternity, paternity or adoption leave.

### Effect on employment status

An agency worker can be a worker or an employee of the agency. It is very unusual for them to be a worker or an employee of the hirer. The Regulations have not changed this. Provided that the agency worker has a contract with the agency (and not the hirer) the risk of the hirer being held to be the agency worker's employer is low. Day 1 rights and 12 week rights will not, in themselves, make an agency worker the hirer's worker or employee. See our Inbrief on Employment Status for further information.

### Information on equal treatment for workers

An agency worker who considers the agency or hirer has infringed the Regulations is entitled to make an information request: to the hirer in the case of Day 1 rights; and to the agency and (if no response) the hirer in the case of 12 week rights.

### Liability

The hirer is solely responsible for any breaches relating to Day 1 rights.

The agency is responsible for setting the agency worker's terms and conditions, and it is therefore liable for any breach in relation to the 12 week rights, to the extent that it was responsible for the infringement.

However the hirer is responsible to the extent it was at fault. So if the hirer gave the agency incorrect information about basic working and employment conditions, or failed to notify the agency of updated information, the liability transfers from the agency to the hirer.

### Employment Tribunal complaints

An agency worker can complain to an Employment Tribunal in several circumstances:

- > An agency worker can claim she/he was deprived of Day 1 rights, not given the same basic working / employment conditions (after 12 week qualifying period) and/or subjected to detriment after raising rights under the Regulations. If the Tribunal finds the complaint well-founded then it can:
  - > make a declaration as to the agency worker's rights
  - > order compensation in respect of the breach and any loss. There is no minimum compensation for a Day 1 right breach whereas for a 12 week or

- detriment breach a minimum of two weeks' pay will usually be ordered
- > recommend the hirer or agency takes specific action to obviate or reduce the adverse effect
- > An agency worker who is employed by the agency can claim they were unfairly dismissed after raising rights under the Regulations. If the Tribunal finds the complaint well-founded then it can order the usual unfair dismissal remedies, namely a basic award based on the statutory formula; and a compensatory award in respect of loss suffered.
- > If a Tribunal finds that the hirer or agency used a series of structured assignments to try to deprive an agency worker of rights under the Regulations then it can order that a compensation award of up to £5,000 be paid to the agency worker; and/or declare that the agency worker is to be treated as having completed the 12 week qualifying period.
- > If a Tribunal finds that the hirer or agency failed to respond (or provided evasive answers) to a valid information request then it can draw adverse inferences (including that a right under the Regulations was infringed).

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### Derogation from the equal treatment principle

If the agency worker has a permanent contract of employment with the agency, is paid between assignments and the contract of employment meets certain other conditions, the 12 week rights relating to pay do not apply.

Because minimum hours and minimum remuneration are key features of this derogation, it is a popular choice in industries where there is high demand for agency workers and long term supply conditions (where paid breaks between assignments are less likely to occur).

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### Practical tips

#### Day 1 rights

Hirers should ensure they have systems for notifying vacancies to all agency workers, for

example by round-robin email, or by posting on a noticeboard or on the intranet (if agency workers have access to such systems).

Hirers should identify what collective facilities and amenities they currently have and ensure they give equal access to agency workers.

#### 12 week rights

Hirers who habitually use agency workers for periods longer than 12 weeks should:

- > systematically consider every term and condition they offer their employees
- > consider whether it would need to be matched for agency workers
- > quantify the potential cost
- > consider whether benefits can be altered to reduce that cost
- > consider whether alternatives to agency workers could be used in appropriate circumstances

Information exchange between agencies and hirers is a key feature of the Regulations in practice. High-use hirers should have practical systems in place for sharing information with their preferred supplier agencies, such as pro forma Q&As or standard pay information exchange systems.

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### Other agency worker rights

In addition to the rights provided under the Regulations, agency workers benefit from a number of other general employment rights. The extent of these rights will depend on whether the agency worker has an employment contract or a worker contract with the agency. If the agency worker has an employment contract, they will enjoy the most legal protections.

Most employment rights will be against the agency (because it is the agency with which the agency worker has a contract) but some may lie against the hirer (for example, protection from discrimination in certain circumstances). Specific rights include, for example, that they cannot be required to work exclusively for one agency or one hirer.

Agency workers are specifically excluded from some employment rights. For example, they are not protected by the Fixed-Term Employee

Regulations and do not have the right to make a flexible working request.

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### Alternatives to using agency workers

Other employment relationships may be appropriate in place of the use of agency workers. For example:

- > Maternity cover - fixed-term employment contract
- > Sickness and holiday cover - casual workers pool
- > Ad hoc need - increased overtime; casual workers pool; zero hours contract
- > Headcount freezes - hire permanent employees but make redundant if need disappears
- > Discrete services such as cleaning - managed service contracts or outsourcing
- > Specialised services - genuinely self-employed consultants (individual or through personal service company)
- > Seasonal work increase - increased overtime, fixed term employment contract; casual worker pool; zero hours contract.

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### In the pipeline

The Government has launched a consultation on agency worker arrangements, following on from the publication of Matthew Taylor's Good Work Review in 2017. The consultants seek views on:

- > improving pay transparency for agency workers
- > gathering evidence on the level of abuse of the derogation from the equal treatment principle (with a view to strengthening enforcement or repealing it)

The consultation closes in May 2018.

For further information on this subject please contact:

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