

Agency Worker Regulations – What are my rights?

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WHAT TO BEWARE OF?

- Where you are moved to two or more assignments or roles with a hirer, would otherwise have been entitled to equal treatment, and it seems that the reason for the moves has been to avoid the regulations applying, then a claim can be made to an employment tribunal for compensation.
- As a result, you should examine closely the reasons that the hirer or agency gives for moving you or hiring you on different assignments;
- You should also remind the hirer or agency of the anti-avoidance provisions contained within the Regulations and the possible consequences of breaching these.

HOWEVER THE REGULATIONS DO NOT COVER EVERYTHING

Look out for the following practices designed to avoid obligation for equal treatment:

- Using substitution clauses in contracts saying you can send someone else to complete a job – this avoids you undertaking the work personally.
- Requiring you to provide your own equipment, so the hirer/agency can argue that you are an independent contractor.
- Getting the agency to appoint a manager who distributes assignments to you on a daily basis.
- Employing only agency workers to do a certain role (e.g. only use agency workers as scaffolders), making it very difficult for you to find a comparator.
- The hirer or agency could hire an employee whose situation was similar and comparable to yours and put them on the same pay and conditions as you – this would defeat a claim by you for equal treatment.

NOTE: There is no specific complaint or remedy in the Regulations for a hirer/agency trying to avoid the Regulations in any of the above ways.

WHAT IF THE REGULATIONS ARE BREACHED?

- You can bring a claim in the employment tribunal. The claim can be against the hirer and/or the agency – in some cases it will be appropriate to bring the claim against both.
- If your claim is successful, you can get compensation taking into account what you have lost. You can also be awarded an additional sum of up to £5,000 by an employment tribunal for a breach of the provisions in the Regulations that are designed to stop organisations avoiding equal treatment.
- You should speak to your regional officer in the first instance if you think you might have a claim.

RIGHT TO RECEIVE INFORMATION

- You can ask the agency (and, if you receive no response from the agency within 30 days, the hirer) in writing for a written statement containing information about your treatment, such as information about your terms and conditions and the terms and conditions of any comparable employees of the hirer.
- The agency/hirer must respond within 28 days, and although you cannot bring a separate complaint about a failure to provide the information, if the hirer/agency does fail to provide the appropriate information, the tribunal can take this into account when considering whether there has been a failure to give you equal treatment.

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REMEMBER

- Regardless of these Regulations, some agency workers will be entitled to certain other employment rights/ protections. Some workers may be entitled to or protected by:
 - Protection from certain types of discrimination under the Equality Act (including pregnancy and maternity discrimination and some equal pay rights).
 - Entitlement to the national minimum wage.
 - Protections/entitlements contained in the Working Time Regulations.
 - Protections provided by the Health and Safety at Work Act 1974.
 - Entitlements under data protection law.
 - Protection against whistle blowing.

You should speak to your regional officer in the first instance to check whether these apply.

Unite has provided guidance to its officers and workplace representatives on how to organise and bargain on behalf of agency workers. These guides can be found on the Unite website:

Unite bargaining guide to the Agency Workers Regulations.

The case for organising agency workers – Dispelling the myths.



**IF YOU HAVE ANY QUESTIONS ARISING FROM THIS LEAFLET,
CONTACT YOUR WORKPLACE REP OR REGIONAL OFFICER**

THE BASICS

- The Agency Worker Regulations introduced on 1st October 2011 (1st December in Northern Ireland) provide rights to equal treatment in relation to basic terms and conditions of employment.
- Agency workers must be treated no less favourably in relation to certain terms and conditions than if they had been employed directly by the organisation with whom they are working.
- Once an agency worker has worked for 12 weeks in the same role with the same hirer, they will have the right to be treated equally in relation to pay, working time and holidays as compared with employees employed by the hirer. They will also be entitled to improved pregnancy rights.
- The Regulations also give agency workers some equal treatment rights from the day they start an assignment, e.g. they have a right to equal access to common facilities provided by the hirer (e.g. equal access to canteen and crèche facilities) and equal rights to apply for vacancies in the hirer's organisation.
- The Regulations will not apply retrospectively, so the 12-week period cannot start before 1 October 2011 (or 1 December 2011 in Northern Ireland).
- The Regulations do not give agency workers employee status.
- Agency workers have a right to join a trade union.

WHO IS COVERED?

- Agency worker – a worker must be supplied by an agency to work temporarily for and under the supervision and direction of a hirer, i.e. there are three parties in the relationship. You must be employed under contract of employment or a contract to provide work and services personally.
- An agency for the purposes of the Regulations is one that assigns workers to work temporarily for and under the direction of another employer. Head hunter organisations are not covered.
- The Regulations apply to all types of hiring businesses/organisations, whether these are in the public, private or voluntary sectors.

WHO IS LEFT OUT?

- Individuals who are headhunted by a recruitment agency, but then become an employee of the hirer.
- Self employed agency workers.
- Independent contractors.
- Individuals who provide services through a limited liability company.

WHEN DO THE EQUAL TREATMENT RIGHTS KICK IN?

- The equal treatment rights on working time, holidays, and pay kick in once you complete a 12-week qualifying period i.e. once you have worked for the same hirer in the same role throughout one or more assignments for a 12-week period.
- Any work done in a particular week counts towards the 12-week period, even if it isn't a full week of work.
- Where there is a break in work of less than 6 weeks and you continue in same role, the weeks worked are preserved.
- Where there is a break of 6 weeks or longer, the qualifying period clock is reset and you have to begin building up the 12 weeks again.
- If you are moved to a new role in the hirer's organisation which is substantively different then the qualifying period clock has to start again, e.g. a role with different job tasks or using different skills. This requires the agency to confirm such a change in writing for it to be valid.
- There are some absences that simply pause the qualifying period clock and preserve continuity that has been built up e.g. where you take sick leave of 28 weeks or less, where you take holidays/leave agreed with the employer, or where industrial action is taking place at the hirer's organisation.
- There are other absences during which the qualifying period clock continues to tick and time continues to build up, such as maternity leave of up to 26 weeks and paternity/adoption leave.

WHAT RIGHTS DO THE REGULATIONS GIVE ME?

Day one

You get some entitlements from day one without having to build up 12 weeks' service with the hirer. These include:

- Equal treatment in relation to collective facilities, e.g. access to canteen/transport services/common room/crèche.
- The hirer has to provide information to agency workers about relevant job vacancies.

However:

- The Regulations do not require employers to provide the same benefits to you in relation to certain off-site benefits, e.g. subsidised gym membership at an offsite gym, nor in relation to certain travel benefits, e.g. car allowances.

After 12 week qualifying period:

- The equal treatment rights are limited to pay/holidays/working time once the 12-week period has been reached.
- The right to equal treatment on pay covers basic pay, holiday pay, overtime payments, shift premia, unsocial hours payments, bonuses based on individual performance, luncheon or childcare vouchers. It does NOT include company sick pay, pension payments, redundancy pay, contractual maternity/paternity pay, or bonuses linked to length of service.
- You will still enjoy the rights you had before the Regulations to statutory sick pay and statutory maternity, paternity and adoption pay.
- The right to equal treatment on holidays covers the right to take leave, the right to the same amount of contractual holiday and same systems for accruing leave, and the right to bank holidays.
- You still have your previous rights to 5.6 weeks of paid holiday per year (which can include public holidays) under the Working Time Regulations.
- The right to equal treatment on working time.

PREGNANT AGENCY WORKERS AND NEW MOTHERS

- Once you have completed the 12-week qualifying period, you are entitled to:
 - The right to reasonable paid time off to attend ante-natal appointments when on assignments.
 - The right to be offered an alternative assignment for a pregnancy-related reason or to be suspended on full pay where a suitable alternative assignment is not available.

WHAT IS THE "SWEDISH DEROGATION"?

This is where an agency worker receives pay between assignments and is a means by which the Regulations which provide equal treatment can be legally avoided.

- You will not qualify for equal treatment on pay (although you will on other conditions like holidays and working time after 12 weeks) if:
 - You are employed on a permanent contract of employment with the agency; and
 - You are paid between assignments.
- Other conditions that must be fulfilled for the exemption to apply:
 - You must be employed for a total of 4 weeks between assignments.
 - During periods between assignments, you must get at least 50% of pay, and this must be a figure that isn't below minimum wage.
 - The agency must give you a written contract specifying some of the terms and conditions upon which you will be employed (minimum pay levels, maximum and minimum hours of work, nature of work you will be offered, locations in which you will be expected to work).
 - The document must be supplied before you start your first assignment. The contract must specifically remind you that you will not qualify for equal treatment on pay, regardless of the length of any assignment with any hirer.
 - The agency must take reasonable steps to find and, if appropriate, offer you suitable work of the same type as that specified in the contract.

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