

THE EU AGENCY WORKERS DIRECTIVE Briefing for clients

REC research shows that over 50% of hirers of temporary agency workers are unaware of the EU Agency Workers Directive (AWD) and its potential implications on their business. This briefing document looks at how the AWD will establish equal treatment for temporary workers and how we can ensure the AWD is workable for hirers and agencies when it comes into force in October 2011. It is important that hirers:

- Understand the current state of play including the scope and implications of the proposed regulations.
- Assess the potential impact the proposed regulations will have on their business.
- Start as early as possible to develop plans with their agency staffing suppliers to minimise the costs and potential disruption the implementation of the proposed regulations may cause.

This briefing has been compiled by The Recruitment & Employment Confederation (REC), the representative body for the UK's recruitment industry and outlines what impact the Directive may have on the future use of agency workers.

What is the AWD?

The purpose of the Agency Workers Directive (AWD) is to give temporary agency workers equal treatment to permanent employees and direct recruits on the basis of 'pay and working conditions'. In the UK, the social partners, the CBI and TUC, agreed in May 2008 that the right to equal treatment will apply only after 12 weeks of service.

Will the AWD mean that using temps becomes more costly and complicated?

If we get the implementation details right, the Directive should not have a negative impact on the use of temps. A high proportion of temps are paid on a par with permanent recruits and practical measures can be put in place to address concerns of additional bureaucracy. A key priority will be for agencies and hirers to work together in order to prepare for new regulations.

What are the timescales?

The UK Government has pledged to bring the implementing regulations into effect on 1st October 2011. This is to reflect the time recruitment agencies and hirers need time to prepare for the change. The Government's guidance will give greater clarity as to what equal treatment will mean in practice and the REC will subsequently be compiling model documents for its members. Recruitment agencies are well placed to ensure that new contracts take account of the legal changes.

Does this mean agency workers will have the same status as my employees?

No. Equal treatment does not represent a change in the employment status of agency workers. Temps will still not be able to claim unfair dismissal, redundancy pay or maternity leave and as such will remain a flexible source of labour for organisations as the economy emerges from recession. Temps have the flexibility to leave their assignments at any time and as such will not be entitled to the same benefits that would normally be given to a direct employee. This includes occupational benefits such as sick pay, pensions, financial participation schemes and bonus payments based upon organisational or company performance.

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What does equal treatment mean then?

Temps will be entitled to the same pay and working conditions after 12 weeks in the same role. This means that after 12 weeks of service they will be entitled to the same basic hourly rate as if they had been recruited directly. They will also be entitled to additional benefits linked to the work done including overtime, shift allowances, unsocial hours premiums/bonuses, payments for difficult or dangerous duties and commission payments. They will also be entitled to the same rest breaks and annual leave as the client's employees.

Anything else?

Whilst the other benefits are only given after 12 weeks, there are some which are from day one. Firstly, you will need to ensure temps are made aware of vacancies that arise in your organisation. Secondly, temps will also be entitled to access a number of collective facilities including crèche and childcare facilities, canteen facilities and the provision of transport services but access to these can be refused if there are 'objective grounds' for doing so. 'Amenities' e.g subsidised gym membership, season ticket loans and childcare vouchers are out of scope as they are considered a reward for loyalty.

How will I establish equal treatment?

Recruitment agencies should be able to help you with this once guidance has been published. In some workplaces, for example a factory production line, the temps may be working next to an employee who could serve as a 'flesh and blood' comparator to establish equal pay and working conditions. If not then there may be an identifiable pay scale or a starting rate which could be used as a reference point. However in other workplaces there may be no easily identifiable comparator, pay scales or starting rates which may be the case in a lot of small organisations. In such a scenario, the temps would need to have the same conditions that 'apply generally' in the workplace, e.g. if all direct hires (i.e. the hirer's own employees) received 25 days' holiday then the temps would be entitled to this as well. If pay and benefits are individually negotiated then it would be difficult for an agency worker to build a claim that they were not receiving equal treatment.

How will the 12 week qualifying period work?

Equal treatment provisions will apply after the temp has been engaged for 12 calendar weeks with the same hirer doing broadly similar duties. This is in spite of the number of actual hours worked during that 12 week period. So for example, if the temp only worked part time hours then they would still qualify for equal treatment after 12 weeks.

The 12 week qualifying period can be broken in the following ways:

- The worker goes to work for a different hirer
- The worker undertakes a 'substantively different' role in the hirer's workplace. This would mean they would need to have a very different set of duties. Simply switching the line manager for instance would not make the role substantively different.
- There is a 6 week gap between assignments for the same job with the same hirer.

The 12 week qualifying period can be paused if the worker takes annual leave, takes certified sick leave or takes time off for public duties. Concerns remain about how agencies will cope with workers who have a series of ad hoc assignments with the same hirer, as is the case in driving and social care and REC will be continuing to work on this.

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Who is liable if it goes wrong?

Hopefully you and your agency will be able to work together to ensure that this scenario is avoided. However if it does go wrong then it will be the recruitment agency who will have the initial liability but will retain a defence if the hirer is uncooperative. It is envisaged that most cases can be effectively dealt with via a recruitment agency's grievance procedure. Where this fails, a pre-conciliation service will be available via acas to minimise the number of claims that end up in an employment tribunal.

Some of the temps my agency supplies to me get paid more than my own employees. Will I have to lower their rate of pay to match the rate paid to permanent workers?

No. If the temps you are supplied with are on a higher rate of pay than your own employees then their pay does not need to be lowered. However you may need to show the steps you put in place to decide on the temp's rate of pay.

Can I circumvent the Directive by employing temporary workers directly?

Unlike workers employed directly, agency workers do not have rights to claim unfair dismissal, request maternity or paternity leave or claim redundancy pay, making them a flexible resource for employers to meet unexpected peaks in demand and cover for absence. Employing workers directly, even on zero hour contracts, means workers may qualify for those additional rights. Neither the Directive nor the implementing regulations will change the employment status of agency workers who will continue to be a more flexible resource than permanent workers employed directly.

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