



Equality for Agency Workers: Government Consultation

The **Directive on Temporary Agency Work** (2008/104/EU) had a very long and protracted gestation, even by European standards. It was finally adopted in November 2008 and member states now have until **5 December 2011** to implement its provisions.

The Directive provides for equality of treatment for agency workers after 12 weeks of work with an end user, in relation to 'basic working and employment conditions' which includes working time, rest periods, holidays and pay.

The UK Government launched a consultation paper on 8 May 2009 as the first stage in its proposals for implementing the Directive. There are still many areas of uncertainty which will be debated before draft Regulations are published. However, we are now a bit clearer about how the Government is intending the new legislation will work in practice.

The consultation will close on **31 July 2009** and the Government has indicated that we can expect to see a further consultation paper setting out 'firm proposals', with accompanying draft Regulations, later in the year.

KEY ISSUES

Who will be protected?

The Government is proposing that the legislation will only cover workers placed with businesses on a temporary basis, where the individual's contractual relationship is with the agency (employment business) rather than the end-user. It will not apply to recruitment agencies where an individual is introduced with a view to permanent employment with a client company.

Self-employed workers, those working through their own limited company and those working on a 'managed service contract' will not be covered.

Qualification period

The Government has confirmed that it intends to calculate the 12 week qualifying period on the basis of 12 calendar weeks, regardless of the individual's working pattern during that period (e.g. part-time hours).

The qualification period would re-start when the agency worker starts a substantially different role with the same hirer. Minor changes in responsibilities or job title would not have this effect, nor would a short break between assignments. The length of the minimum period has not yet been decided, but the consultation paper suggests that one week would be too short.

Equality of treatment

The Directive requires equality of treatment in relation to '**basic working and employment conditions**', meaning conditions relating to the duration of working time, overtime, breaks, rest periods, night work, holidays and pay (Article 3).

In relation to working time arrangements, including rest breaks and holiday entitlements, an agency worker would be entitled to the same treatment as a permanent employee after 12 weeks of service. It has been suggested in the consultation paper that in order to simplify administrative arrangements, any contractual holiday entitlement over and above the statutory entitlement could be paid in lieu either as a one off payment at the end of the assignment or as an uplift to the daily or hourly rate. This would effectively operate as 'rolled up holiday pay' but only in respect of the contractual element of the holiday entitlement.

'Pay' is not further defined in the Directive, but the Government is proposing that it will cover not only basic pay, but also holiday pay, overtime, shift allowances, unsocial hours premiums and bonuses and some bonuses relating to personal and individual performance. It would not include benefits such as share schemes or company car allowances, and agency staff would not be entitled to join company pension schemes.

Agency workers will also be entitled to access any amenities or collective facilities provided by the end user, such as a crèche or a staff canteen, from the first day of an assignment, unless the end user can objectively justify denying them access on the same basis as permanent staff. Agency workers must also be given notice of any permanent job vacancies with the end user.

Pregnant women and nursing mothers are also entitled to additional protection under the Directive, and the Government is proposing to extend health and safety protections to agency workers to give them the right to a temporary adjustment of working conditions or working hours or the offer of suitable alternative work to remove any risk to their health and safety, or the right to be suspended from work on full pay where these options would not remove the risk. In addition they will have the right to reasonable paid time off to attend ante-natal appointments.

Exceptions

The Government is proposing to take advantage of the exception permitted under the Directive which provides that the principle of equal treatment does not apply to those working for an employment agency who are guaranteed a minimum amount of pay between assignments. This would need to be a "reasonably high proportion" (at least half) of the pay received on their previous assignment, so the exception would apply in limited circumstances.

In addition, the Government has indicated that it would like to make use of one of the other derogations under the Directive, which would allow agreements between worker and employer representatives (workforce or collective agreements) to establish employment conditions for agency workers as long as an adequate level of protection is maintained.

Equal to whom?

An agency worker in a 'given job' is entitled to at least the basic employment conditions they would have received 'if they had been recruited directly by that undertaking to occupy the same job'. The Government has confirmed in the consultation paper that the key will be comparison with a comparable worker doing **broadly similar work** in the same organisation. The regulations will specify the legal test that will apply, but it seems likely that a very similar approach will be adopted to that in the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

This would mean that an employment tribunal would take a broad view of whether permanent and agency staff are engaged to carry out the 'same work'. Some guidance as to how this would work in practice was provided by the House of Lords in the part time workers case of *Matthews and others v Kent & Medway Towns Fire Authority and others [2006]*. This case concerned a claim made by retained (part time) firefighters for equality of treatment with full time firefighters, who had extra pay, access to more favourable sick pay and a pension. The tribunal concluded that whilst the principal purpose for both sets of firefighters was to put out fires, the full timers had additional duties and responsibilities that justified the difference in terms. However, the House of Lords disagreed and held that tribunals should focus on the similarities rather than the differences between the jobs. If a large component of the work of both groups is the same, the question is whether any differences are sufficiently important to prevent the work being regarded overall as 'the same or broadly similar'.

In the absence of a comparable worker to the agency worker, the Government has indicated that it will set out in guidance other relevant factors that can be taken into account, such as existing pay scales for permanent staff and relevant collective agreements.

Liability

Primary liability for providing equality of treatment will lie with the employment agency. However, since the agency will have to rely on information provided by the end user about the employment conditions of permanent staff, the Government is intending to provide a defence to agencies who have taken 'reasonable steps' or used their 'best endeavours' to obtain accurate and relevant information from the end user. If the end user has provided inaccurate or incomplete information, liability in the event of any claim will pass to the hirer.

The information to be provided by the end user to the agency would not be included in the Regulations, since what would be required in each case will vary; instead detailed guidance will be issued to assist the parties to comply with their obligations.

In order for agency workers to establish whether they are receiving equality of treatment, the Government is proposing that they will have the right to request written details from the agency, to be supplied within 21 days.

Thresholds for representative bodies

The Directive provided that agency workers must count for the purposes of calculate e.g. the threshold above which representative bodies (under Community and national law) are formed. This will include, for example, the thresholds applying for information and consultation purposes and for statutory trade union recognition purposes.

The Government has indicated that it intends agency workers to count towards the calculation of thresholds applicable to the agency rather than the end user.

CONCLUSION

The Government has already indicated that it intends to introduce Regulations to implement the Directive during the current Parliamentary session, although the date for this legislation to come into force is still under debate.

The earliest possible date for implementation would be April 2010, but it appears likely the Government will bow to pressure from employers' groups to delay implementation until October 2011.

We can expect to see draft Regulations before the end of 2009, at which point we will be a lot clearer about how this legislation will impact on employers. For employers who currently make extensive use of temporary agency staff, it would be advisable to start reviewing their use at the earliest possible opportunity. Agencies will also need to undertake a great deal of work between now and the introduction of this legislation to establish how it will work in practical terms.

For more information on any of the issues discussed in this guide please contact Elizabeth Stevens in our employment team.

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