Delivering equal treatment for agency workers

A TUC bargaining guide

TUC

▲ *After years of campaigning by trade unions, agency workers now benefit from new equal treatment rights*

Foreword

In recent decades the reliance on agency working has grown significantly in the UK. Agency workers are increasingly the people who pick or package our food, handle our enquiries in call centres and serve our meals. They care for our elderly and do any number of vital but often unappreciated jobs. They often find themselves in low-paid work, in poor conditions and doing routine and repetitive work. They face job and economic insecurity, pay poverty and in some cases rank bad treatment.

The growth in agency work is a central feature of the UK flexible labour market. While some workers are attracted by the flexibility of agency work, for many "temping" is the only employment option open to them. Too often employers use agency workers to replace permanent staff, to cut their wages bill, to undercut collective agreements and to ensure they are free to hire and fire staff at will. As a result the mistreatment of agency workers has become widespread.

For years trade unions in the UK and across Europe have campaigned for laws to end the discrimination faced by agency workers.

In September 2008 an agreement was reached between the TUC, the CBI and the UK government. This agreement helped to remove the obstacles which had previously blocked progress on equal treatment rights for agency workers across Europe. In November 2008, the European Union Temporary Agency Worker Directive was adopted. The Directive will now be implemented in the UK through the Agency Worker Regulations 2010.

The Regulations provide an important floor of rights for agency workers, including rights to equal treatment on pay, holidays and working time entitlements after 12 weeks in the same role with the same employer; and rights to equal treatment from day one on access to collective facilities and information on vacancies in the hirer's workplace.

Trade unions have a key role to play in ensuring that these rights become a reality in the workplace. We hope this guide will prove a useful resource for union reps and officials involved in organising, representing and negotiating on behalf of agency workers. Clearly there is a big job to be done to ensure that agency workers benefit from pay parity and from improved access to permanent employment.

Brendan Barber
General Secretary TUC

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Introduction

Hundreds of thousands of agency workers across the UK face discrimination at work. They are frequently paid less, are required to work excessive hours with no overtime pay, and are entitled to less holiday than directly employed workers doing exactly the same job.

New equal treatment rights for agency workers came into effect on 1 October 2011, after years of campaigning by trade unions. These new rights are contained in the Agency Worker Regulations 2010 (AWR).

Unlike fixed-term employees and part-time workers, agency workers do not have a right to equal treatment on all terms and conditions. The rights contained in the AWR can be summarised as follows:

Summary of AWR rights

From day one of an assignment agency workers will have a right to:

- equal access to collective facilities provided by the hirer
- information and the opportunity to apply for vacancies in the hirer's workplace.

After 12 weeks in the same role with the same hirer agency workers will have the right to:

- equal treatment on pay, holidays and working time
- improved pregnancy rights.

Since 1 October 2011, where unions are recognised, they have the right to receive information from the employer about the numbers and locations of agency workers and the type of work they do in an undertaking.

This guidance relates to Great Britain. Separate but similar regulations are being implemented in Northern Ireland.

Outline of the guide

Sections 1 to 10 summarise the new rights contained in the AWR and include tips for union reps. Section 11 covers the representation of agency workers and section 12 deals with the enforcement of AWR rights. Section 13 outlines the factors which determine an individual's employment status.

This guide aims to help trade union reps and officers involved in organising, representing and negotiations to win a better deal at work for agency workers.

It aims to outline new equal treatment rights for agency workers. The information contained is for guidance only and should not be regarded as an authoritative statement of the law.

Reps should always seek advice from their union on their specific situation before taking any action.

Glossary

- *A "master vendor" is an agency a hirer appoints to manage the recruitment of agency workers often from a range of agencies.*
- *A "neutral vendor" is a management company appointed by a hirer which does not normally supply any workers directly but manages the supply of agency workers from other agencies.*
- *An "umbrella company" acts as an employer to independent contractors who work on temporary contracts usually through an employment agency. Contractors normally have a contract of employment with the umbrella company. Umbrella companies normally issue invoices on the contractor's behalf, collects payments from clients/ agencies, calculates tax and national insurance (N.I.) contributions and pays the contractor their net pay.*

Section One

Who has rights?

This section explains the key definitions used in the AWR 2010. It explains which agency workers, agencies and hirers are covered by the new equal treatment rights.

Temporary work agencies

The AWR apply to temporary work agencies that supply agency workers to work temporarily for and under the supervision and direction of a hirer. They apply to all temporary work agencies regardless of whether they are run for profit or on a charitable basis or whether they operate in the public, private or voluntary sector. High-street chains, gangmasters and small agencies run by one individual will all be covered.

The AWR do not apply however when an agency finds or attempts to find an individual direct and on-going employment with a hirer, or where an agency provides recruitment or head-hunting services for a hirer.

Intermediaries involved in the supply of agency workers

The AWR seek to cover the complex arrangements which have developed in the recruitment sector in recent years. They will apply to all intermediaries who are involved in the supply or payment of agency workers. This includes umbrella companies, master vendors and neutral vendors (see glossary on page 5 for explanations of these terms).

Hirers

Any company, partnership, sole trader or public body which books an agency worker via a temporary work agency will be a hirer. This includes companies and organisations in the public, private and voluntary sectors.

In most workplaces it will be clear who the hirer is.

Agency workers

The AWR only apply to individuals who are an "employee" or "worker" of the agency. The definitions used for "employees" and "workers" in the AWR are very similar to those used for other statutory employment rights.

As a general rule, agency workers who qualify for the National Minimum Wage (NMW) or statutory holiday rights are also likely to be covered by new equal treatment rights.

Please go to section 13 for more information on the factors which will determine whether an individual is an "employee" or a "worker".

The Regulations also apply to members of the armed forces, House of Lords and House of Commons staff and the police.

Self-employment

Agency workers who are genuinely self-employed will not be covered by the AWR. In order to lose out on equal treatment rights, an agency worker must be self-employed, i.e. there must be a business to business relationship between the agency worker and the hirer.

Please go to section 13 for more information on the factors which will determine whether an individual is "self-employed".

In recent years, unscrupulous employers and agencies have sought to employ individuals on a "bogus" self-employment basis in order to avoid employment rights obligations. Section 13 explains these tactics in greater detail.

Who is the hirer in schools?

The question who is the hirer is often more complex in schools in England. Who is the hirer in a school will depend on the circumstances in each case.

As a general guide:

- *In maintained schools (e.g. in community schools and maintained nursery schools), the hirer will either be the local authority or the school's governing body, depending on the circumstances.*
- *In foundation schools, voluntary aided schools and foundation special schools, the school's governing body will be the hirer.*
- *For academies, including free schools, the proprietor of the school (often known as the "Academy Trust") will be the hirer.*
- *In independent schools, the proprietor of the school will be the hirer. Reps should seek advice from their regional or national officers.*

Where they are uncertain, reps should seek advice from their regional official.

In some industries unions have successfully negotiated agreements with hirers and agencies that agency workers will not be hired on a self-employed basis.

For example, in parts of the meat processing sector, Unite have successfully negotiated that agency workers will not be employed on a self-employed basis.

Other unions have successfully won rights for members by running employment tribunal cases that show that self-employment contracts are a sham and not effective.

Tips for union reps

Union reps should monitor the use of self-employment arrangements by agencies and hirers and where possible seek agreement that agency workers will not be hired on a self-employed basis.

Reps can use the checklists outlined in section 13 to assess whether agency workers are employed as an "employee", a "worker" or on a "self-employed" basis.

Managed service companies

Managed service companies (MSCs) usually operate where businesses or organisations have contracted out an entire service, for example a catering or cleaning service.

Where an MSC directly employs staff to work on a service, for example, a catering or cleaning service, these workers will not be agency workers.

If an MSC hires agency workers to work alongside their direct staff, the agency workers will be able to compare their pay and conditions to those of the MSC employees.

Reps should be aware that the mere presence of an agency manager on site will not mean that an MSC arrangement exists and that the AWR do not apply.

In-house banks

Some employers have set up in-house banks of staff to assist them to cover staff absences and peaks in workloads. This is a common practice in the NHS, social care and in car manufacturing.

Whether such banks will be covered by the AWR will depend on the employment relationships in each case.

- Where bank staff are employed by a different organisation from the organisation they work for, it is likely that the AWR will apply.
- Where bank staff are employed by the same organisation they work for it is unlikely that the AWR will apply. But the bank staff will be covered by wider equality law.

Making the case for equal treatment for bank staff

Unions have always recognised that permanent and regular employment offers the best security and pay and conditions. However, where this is not achievable, reps could consider proposing that employers create an in-house bank rather than relying on agency workers to meet peaks and troughs in demand.

Where in-house banks are used, union reps should seek agreement that bank staff should receive the same pay and conditions as permanent staff. This is the best way of ensuring the main employer complies with the AWR and the Equality Act 2010.

Section Two

Establishing equal treatment on pay, holidays and working time

Scope of equal treatment rights

Unlike part-time workers and fixed-term employees, agency workers do not have the right to equal treatment on all terms and conditions of employment. Instead, after completing a 12-week qualifying period, agency workers have a right to equal treatment on pay, holidays and working time entitlements.

Agency workers also have the right to equal treatment in relation to collective facilities and to information about vacancies in a hirer's workplace from day one of an assignment (see sections 7 and 8 for more information).

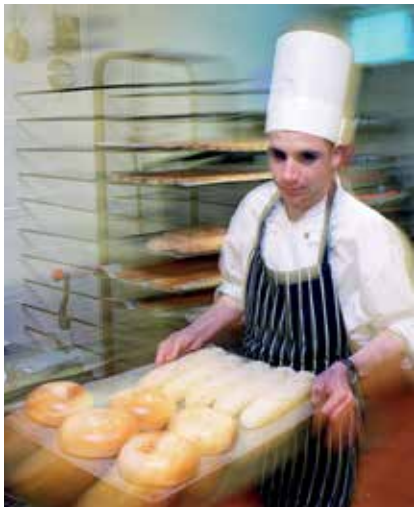
What is meant by equal treatment?

The approach taken in the AWR to equal treatment on pay, holidays and working time entitlements differs from that used for other equal treatment rights. Under the AWR, agency workers are entitled to the same pay, holidays and working time entitlements as if they had been recruited directly by the hirer.

The key question for the purposes of the AWR is:

What would the agency worker have been paid and what would their holidays and hours have been if they had been directly recruited by the hirer to do the same job?

Reps should be aware that agency workers only have the right to equal treatment with terms and conditions ordinarily included in the contracts of the hirer's employees or workers.



This means that when assessing whether they have received equal treatment, agency worker's pay and conditions should be compared with those contained in:

- standard contracts given to the hirer's employees or workers
- a collective agreement – whether a workplace agreement or a national agreement
- a staff handbook
- pay scales
- grading systems
- the going rate for a job
- custom and practice
- a review body award.

Genuinely individualised terms or purely discretionary bonuses and benefits will not normally be covered by equal treatment rights. But where a bonus or benefit is received on a regular basis and has become custom and practice it will be covered by equal treatment rights.

Guiding principles for establishing equal treatment

- In workplaces with pay scales or clear pay structures, it should be relatively straightforward to identify the appropriate entry point on the pay scale, taking into account where appropriate an agency worker's skills, qualifications or length of service.
- In workplaces with no formal pay structure, but where there is a going rate for the job, agency workers will be entitled to the going rate after 12 weeks.
- In workplaces with individualised pay rates agency workers may not be able to claim equal pay, but if all the hirer's employees are entitled to 30 days' leave from the first year of employment, then agency workers will be entitled to 30 days' holiday after 12 weeks.

If the hirer does not directly employ any workers to do the same job as agency workers in a particular workplace, the agency worker may be able to compare their pay and conditions to those of employees or workers employed by the hirer to do the same or similar job in another workplace. Agency workers may also be able to compare their pay and conditions with those of a former employee.

Compliance with equal treatment rights

The AWR state that hirers and agencies will be deemed to have complied with equal treatment rights where they can identify a comparable employee of the hirer who receives the same pay and holiday and working time entitlements as the agency worker.

For this defence to succeed the comparator must:

- be a current "employee" of the hirer and
- be doing the same or broadly similar work as the agency worker and where relevant have a similar level of qualifications or skills and
- work in the same workplace, or where there is no comparator in the same workplace, work in another workplace owned by the hirer.

The comparator's terms and conditions must also be consistent with those which are ordinarily contained in the contracts of hirer's employees.

A former employee cannot be used as a comparator.

Do a hirer's employees have a right to equal treatment with better paid agency workers?

It is not uncommon for agency workers who have scarce skills to be paid more than directly employed staff. However, under the AWR directly employed employees cannot claim equal treatment with agency workers.

For example, planning officers supplied by an agency to a local authority are paid more per hour than directly employed officers but they are entitled to less holiday. The officers employed by the local authority cannot use the AWR to claim the same rate of pay as that paid to the agency workers. However, the agency planning officers will be entitled to the same enhanced holiday entitlements as the directly recruited local authority officers after completing the qualifying period.

What happens where some of the hirer's employees are on TUPE-related pay and conditions?

In workplaces, where some employees' pay and conditions are protected under the TUPE Regulations, but new recruits receive lower rates of pay and fewer holidays, agency workers will only be entitled to the same pay and conditions as the new recruits and not the transferred staff.

Practical examples

In workplaces with collectively agreed pay scales

A qualified teacher is hired as a supply teacher via an agency to work in a community school maintained by the local authority. After completing the 12-week qualifying period the agency worker should be paid in line with pay scales set out in the School Teachers' Pay and Conditions Document. Their pay rate will be determined according to the Document on the proper spinal rate according to their skills and experience.

An agency worker is recruited to work on the production line in a drinks factory. Under a collective agreement, the hirer's employees on the production line are paid £7.00 an hour while they complete six weeks on-the-job training and then £8.00 an hour. Agency workers receive the same training during the first six weeks of their assignment. After completing the 12-week qualifying period, the agency worker will be entitled to be paid £8.00 an hour. This is because the agency worker is doing the same job and has the same skills level as the trained employee.

A local authority hires all its social care workers through an agency. There are no directly employed social care workers in the authority. However, the local authority applies NJC negotiated pay and conditions. After completing the 12-week qualifying period, the agency workers' pay and conditions must be determined in line with the NJC agreement.

In workplaces with no formal pay scale but a going-rate for a job

A call centre in a financial services company has decided to hire more agency workers to handle enquiries relating to a new product. The agency workers are paid £6.50 an hour. There are 20 permanent employees in the call centre and 30 agency workers, all doing the same job. The hirer's employees and the agency workers receive the same on-the-job training. The permanent employees are paid between £11 and £12 an hour depending on their length of service. There is clearly a going rate for the job. After 12 weeks in the role, agency workers will be entitled to £11 an hour.

Small or micro firms

A micro firm decides to hire a cleaner through an agency. The firm does not employ any other staff. The agency worker is paid NMW rates. The agency worker will not have a right to claim a higher rate of pay under the AWR as there are no other employees to compare their pay and conditions with. If however the firm previously directly employed cleaners and paid them £8 an hour, a rep should argue that the firm ordinarily pays cleaners £8 an hour, therefore the agency worker should be paid £8 after 12 weeks.

Similar rules are likely to apply to care assistants, who are hired via an agency.

Deemed to comply with equal treatment

A fruit grower employs four permanent workers throughout the year to maintain the farm and to help with fruit picking. The workers also are trained to operate fork-lift trucks. During the main fruit picking season, the company employs an additional three workers directly and hires 50 agency workers to pick and pack the fruit. The agricultural workers are paid £7 an hour. All the pickers, including the direct recruits and the agency workers, are paid NMW rates. The agency workers will not be entitled to be paid £7 after qualifying for equal treatment. The fruit grower will be able to argue that they comply with the AWR because the directly recruited pickers are employed on the same pay and conditions as the agency workers. The agricultural workers are not relevant comparators because the permanent employees are required to use broader skills.

Section Three

Equal treatment on pay

After 12 weeks in the same role for the same hirer, agency workers will have the right to the same pay as if they had been directly recruited by the hirer to do the same job.

Please go to section two for information and practical examples on how to establish whether an agency worker is receiving equal pay.

Meaning of pay

This section explains what counts as pay in the AWR.

Pay includes:

- the basic pay the agency worker would have received had they been hired directly, based on the hourly, daily or weekly rate of pay; piece rates or the annual salary (usually converted into a hourly or daily rate)
- holiday pay, including entitlements above the statutory minimum (see section 4)
- enhanced pay rates for working on bank holidays (see section 4)
- unsocial hours payments
- overtime pay (see below)
- shift allowances and risk payments for hazardous duties
- attendance allowances
- tips in restaurants
- bonuses, commission payments and performance related pay directly connected to the work done by the individual (see below)
- discretionary bonuses which are paid on a regular basis and therefore have become custom and practice
- vouchers or stamps which have a monetary value and can be exchanged for goods or services, for example, childcare vouchers, luncheon vouchers (this does not include services provided through salary sacrifice schemes).

Pay does not include:

- occupational sick pay
- occupational pensions or any payments made in connection to retirement
- occupational maternity, paternity and adoption pay
- redundancy pay
- pay related to time off for trade union duties
- expenses incurred during the course of employment (e.g. accommodation costs)
- payments linked to the distribution of shares or share options or a share of profits
- any bonuses or payments not linked to the quality or amount of work done by a worker and which, for example, seek to encourage a worker's loyalty or reward long-term service (see below)
- guarantee payments
- wage advances and employee loans
- benefits in kind
- any payments that fall outside the employment relationship.

It is important to note that these exclusions do not affect agency workers' other statutory or contractual entitlements to, for example:

- statutory sick pay
- statutory maternity, paternity or adoption pay
- pensions entitlements under new automatic pension enrolment – the Department of Work and

Pensions (DWP) and the National Employment Savings Trust (NEST) have prepared a useful handout explaining the new arrangements: *www.dwp.gov.uk/docs/auto-enrol-and-wpr-the-facts.pdf*

Workers who are employees of the agency will also be entitled to statutory redundancy pay after working for an agency for more than two years.

Pay rises and increments

Once they have qualified for equal treatment, agency workers will be entitled to any pay rises awarded to the hirer's employees. Agency workers will also benefit from pay increments if they meet any service requirements which apply to comparable directly recruited workers.

Overtime pay

After qualifying for equal treatment, agency workers will have the right to the same overtime pay as the hirer's employees doing the same job. However, where the hirer's employees are required to work a specified number of hours, for example 35 hours, before they receive overtime, agency workers can also be required to work 35 hours before receiving overtime pay.

Agency workers will not have the right to equal treatment on non-contractual overtime pay.

Pro rata pay

Agency workers who work part-time can be paid on a pro rata basis provided that the hirer's part-time employees are also paid on a pro rata basis.

If the hirer's employees are paid for a full shift even though they are allowed to leave early when all their work is completed, then agency workers must also be paid for the full shift, if they too finish early.

Notice pay

If an agency worker's contract states that they have a right to notice before being taken off an assignment with a hirer, agency workers who have qualified for equal treatment must receive equal pay during the notice period. However, agency workers will not have a statutory right to equal treatment on payments in lieu of notice.

Bonuses and performance-related pay

The right to equal treatment on pay applies to bonuses, commissions or incentive payments which are directly attributable to the amount or quality of the work done by the worker. Bonuses which are not connected to the individual's performance and are paid to encourage loyalty or to reward the individual's length of service will not be covered by equal treatment rights.

Examples of performance-related pay that are covered include:

- commissions linked to sales
- bonuses paid to all staff who meet certain targets.

Where a bonus paid to direct recruits reflects both an individual's performance and their length of service, for example, where direct recruits are entitled to 50 per cent of an annual bonus when they have worked for only six months, then an agency worker's bonuses must be assessed on the same basis.

Examples of performance-related pay that are excluded include:

- bonuses that reflect overall company performance (e.g. profit levels) and are not allocated on the basis of individual performance
- bonuses that are paid to reward length of service but which are not linked to individual performance, e.g. where direct recruits receive a bonus after five years of employment.

Hybrid performance-related systems

Where hirers operate hybrid performance-related systems (for example, that reward both personal performance and corporate performance), hirers should still consider extending the system to agency workers. Not only is this best practice, it will also ensure that the organisation complies with equal treatment rights.

Appraisals

Hirers should use the same systems for assessing agency workers as for their own employees. The hirer should carry out the appraisal and then inform the agency what bonus the agency worker should be paid. This is the best way to ensure agency workers receive equal treatment.

Access to training opportunities

Hirers and agencies also have a legal responsibility to ensure agency workers receive health and safety training.

Hirers should also provide agency workers with access to the same training opportunities as direct recruits. Not only is this good practice, it is also likely to contribute to operational effectiveness.

Avoidance tactics: starter and training rates

Some hirers plan to introduce "starter rates" or "training rates" in order to reduce wage costs for agency workers and circumvent equal treatment rights.

Tips for reps

There are potential risks for hirers and agencies if they seek to use starter rates and training rates for these purposes. For example:

- Hirers/agencies are unlikely to be in compliance with the AWR if they introduce a starter rate, training rate or a new pay grade that only applies to agency workers and not to the hirer's employees.
- Hirers/agencies should be careful not to place agency workers automatically on a starter rate without taking into account the job which the agency worker does or their skills or experience. After qualifying for equal treatment, agency workers will have the right to the same pay rate as new employees doing the same job and who have similar skills or qualifications.
- An agency worker who is returning to a workplace to do a job that they were trained to do on a previous assignment should be paid the same pay rate as a trained employee and not placed on a starter or training rate.

The introduction of starter or training rate is also likely to generate workplace tensions, especially where individuals work in the same teams but on different pay rates. This will have a negative impact on staff morale, retention rates and organisational effectiveness.

Pay scales and job evaluation

If a hirer is conducting a job-evaluation scheme or negotiating over pay scales, reps should seek to agree that jobs usually undertaken by agency workers are assessed and included in the grading systems and pay scales.

Cuts in pay rates for the hirer's employees

Some unscrupulous hirers are proposing to cut pay rates for their own employees in order to avoid any increased costs associated with complying with new equal treatment rights. If an employer unilaterally imposes a wage cut on existing employees, they may be able to claim for a breach of contract. Such practices are also likely to damage industrial relations.

Bargaining for equal pay for agency workers

Some unions have successfully negotiated equal pay for agency workers from day one of their assignment.

Examples include:

- In 2010, Unite reached an agreement with Asda that all agency workers would be paid the same rate of pay as permanent workers in all meat and poultry firms which supplied the retailer. Some agency workers earned between 30p and £1 less an hour than their permanent counterparts. Unite reported that some 6,000 workers gained a pay rise as a result of the agreement.
- PCS ran a successful campaign for their agency worker members in the Welsh Assembly. The union ensured that all existing agency workers were transferred onto fixed-term contracts, allowing agency workers a greater deal of security and protection through increased employment rights. The union agreed that when agency workers were used by the Welsh Assembly they received equal treatment including equality on pay, sick pay, 30 days' holiday and involvement in the performance management processes.
- When KP/McVities first started to use agency workers, Usdaw reached an agreement that the agency workers would receive the same rate of pay (at starter rate) and premiums as permanent workers. Agency workers also benefit from negotiated pay increases every year.

Making the case

It is likely to be complex for hirers who use agency workers regularly to apply and monitor the 12-week qualifying period (see section six). It will be less complicated and more cost effective for hirers to pay agency workers the same rate as direct recruits from day one of an assignment. Providing agency workers with pay parity from day one can also help to reduce workplace tensions and to promote better team-working.

Section Four

Equal treatment on holiday and working time entitlements

After 12 weeks in the same role for the same hirer, agency workers will have the right to the same holiday and working time entitlements as someone directly recruited by the hirer to do the same job.

This includes equal treatment on:

- holiday pay and the ability to take leave
- rights relating to bank and public holidays, including enhanced pay rates for working on bank or public holidays.

Please go to section two for information and practical examples on how to establish whether they are receiving equal treatment on holidays and working time entitlements.

Holiday rights

Before qualifying for equal treatment

Although some unions have negotiated better contractual holiday rights, in many workplaces, before qualifying for equal treatment, agency workers will only be entitled to statutory holidays.

Statutory holiday leave

Under the Working Time Regulations 1998, agency workers have the right to 5.6 weeks' paid leave each year. The amount of leave an agency worker is entitled to will depend on their working pattern. For example:

- An agency worker who works two days a week will be entitled to 11.2 days' holiday a year (5.6 x 2).
- An agency worker who works five days a week will be entitled to 28 days' holiday (5.6 x 5 = 28).

Statutory holiday entitlement is capped at 28 days. This can include time off on bank or public holidays.

When an agency worker's hours are irregular, it will probably be easier to work out their entitlement in hours. Reps should work out the agency worker's average weekly hours over the preceding 12 weeks and then multiply this by 5.6. The result will be the number of hours of holiday to which the agency worker is entitled.

Statutory holiday pay

For each week of statutory leave, agency workers have the right to be paid a week's pay.

It is unlawful for employers to pay agency workers in lieu (i.e. to pay rolled up holiday pay for statutory holiday entitlement) for any statutory holiday pay. Agency workers should only receive payment in lieu if their assignment has been terminated and they have not used all their leave entitlement.

Businesslink has more useful guidance on calculating holiday and holiday pay entitlements: *www.businesslink.gov.uk/bdotg/action/detail?itemId=1074414843&type=RESOURCES*

See also the Acas advice leaflet on holidays and holiday pay: *www.acas.org.uk/CHttpHandler.ashx?id=955&p=0*

Equal treatment on holidays

Once an agency worker has qualified for equal treatment, they will be entitled to equal treatment on all holiday entitlements applying in the hirer's workplace, including those which exceed the statutory minimum.

If the hirer's employees are entitled to 36 days' holiday a year, agency workers will also be entitled to 36 days' annual leave a year after completing the qualifying period.

Where the hirer's employees need to meet service requirements before benefiting from enhanced holiday, the same service requirements can be applied to agency workers.

Calculating an agency worker's holiday entitlement after they qualify for equal treatment

When calculating how much leave an agency worker is entitled to, in general the same rules will apply to agency workers as to other new employees starting work for the hirer. However, once they qualify for equal treatment, agency workers should also be entitled to retrospective leave for the period of time during their qualifying period.

a) The leave year

In most workplaces employers manage holidays by using a leave year – that is, the 12-month period over which employees are expected to use their annual leave entitlement.

If an employee starts employment part way through the leave year, they will be entitled to leave for the remaining proportion of the year. For example, where an employee starts work six months into the employer's leave year they will be entitled to 50 per cent of the annual leave entitlement in that leave year.

Similar rules will apply to agency workers who have qualified for equal treatment. However when calculating an agency worker's holiday entitlement, the relevant date will be the start of their qualifying period and not the date they actually qualify for equal treatment. If the agency worker took any annual leave during the qualifying period, this must be deducted from the total.

b) Building up leave

In some workplaces, employers require new starters to build up their holiday entitlement during their first year of employment. Under the Working Time Regulations, employers can decide that employees will accrue leave in advance at a rate of 1/12th of their annual leave entitlement at the start of each month of employment.

Employers offering more generous contractual leave may also use a similar accrual system for their employees. In such workplaces, the same accrual system should also apply to agency workers who have qualified for equal treatment. However, when calculating how much leave an agency worker will be entitled to, the relevant date will be that on which the agency worker's qualifying period started and not the date when the agency worker actually qualified for equal treatment. If the agency worker took any annual leave during the qualifying period, this must be deducted from the total.

Equal treatment on holidays

After qualifying for equal treatment, agency workers will be entitled to the same holiday pay as if they had been recruited directly by the hirer. This includes holiday pay in excess of the statutory minimum.

It is unlawful for employers or agencies to provide rolled up holiday pay for statutory holidays. The BIS guidance on the AWR states that it is possible for agencies and hirers to pay agency workers in lieu for any holiday entitlements which exceed the statutory minimum.

The TUC does not agree. In our view, agency workers can only be paid in lieu for holidays in two situations:

- Firstly, where an individual's assignment with a hirer has been terminated, the agency worker – like any other worker – must be paid in lieu for any untaken statutory or contractual holidays.
- Secondly, where a hirer can buy out holiday entitlements above

the statutory minimum, the same arrangements should apply to agency workers once they have qualified for equal treatment.

If an agency or hirer seek to pay agency workers in lieu for all holiday entitlements above the statutory minimum and not apply the same rule to the hirer's employees, this is likely to be in breach of the AWR.

Requesting and taking leave

Equal treatment rights also apply to other terms and conditions relating to annual leave, including the ability to request and take leave. This means that once an agency worker has qualified for equal treatment:

- Hirers and agencies cannot require agency workers to give more notice than the hirer's employees before taking leave.
- Hirers and agencies will not be able to refuse requests for holiday from agency workers when the hirer's employees would be permitted to take leave. For example, agency workers cannot be refused holiday during peak seasons or the summer months, if the hirer's employees can take leave then.
- If the hirer's employees are not permitted to take leave during peak seasons or summer vacations, the same rules can be applied to agency workers.
- Similarly, if directly recruited employees are required to use part of their annual leave entitlement on bank holidays, during the Christmas period or during a factory summer closure, agency workers can also be required to use part of their leave entitlement during this period (as long as they remain on an assignment with the hirer).
- Agency workers will be entitled to equal treatment relating to any arrangements for carrying forward leave.

Equal treatment on bank and public holidays

After completing the 12-week qualifying period, agency workers have the right to the same terms and conditions relating to bank and public holidays as if they had been directly recruited by the hirer to do the same job.

Time off on bank holidays

After qualifying for equal treatment, agency workers will have the same rights to time off on bank holidays and public holidays as if they had been directly recruited by the hirer to do the same job.

Where the hirer's employees and workers are entitled to additional leave on bank holidays or public holidays, agency workers will be entitled to the same additional leave. Agency workers who work part-time should be entitled to equivalent additional time off, even when their normal working days do not fall on the bank holiday.

Bank holiday working and pay

Agency workers who have qualified for equal treatment are entitled to receive the same enhanced pay rates for bank holiday working as the hirer's employees.

Agency workers should also be treated in the same way as the hirer's employees in relation to the opportunity or requirement to work on bank holidays or public holidays. Agency workers cannot be required to work on bank or public holidays if the hirer's employees are all permitted to take leave. Similarly, where employees opt to work on bank or public holidays due to enhanced pay rates, agency workers must also be given the same opportunity as the hirer's employees.

Bargaining for equal treatment on holidays

As with pay, union reps should seek where possible to negotiate equal treatment for agency workers on holidays from day one of any assignment.

As explained above, it is likely to be complex for hirers and agencies to monitor the 12-week qualifying period and ensure agency workers receive equal treatment on holidays. It will be simpler and more cost effective for hirers and agencies to agree to equal treatment on holidays from day one.

Reps should also propose that agency workers use the same system for requesting leave as permanent staff (for example, having access to software and online forms). The hirer should determine when leave can be taken and inform the agency. This will help to ensure that equal treatment rules are complied with. In workplaces where there is a high concentration of agency workers, reps should suggest that agencies and hirers should run concurrent leave years. This would avoid unnecessary complications when calculating leave entitlement.

Equal treatment on working time entitlements

After working for 12 weeks in the same role for the same hirer, agency workers will have the right to the same terms and conditions relating to working time as if they had been directly recruited by the hirer to do the same job.

Duration of working time

After completing the 12-week qualifying period, agency workers have the right to equal treatment on the duration of working time. This means, for example:

- Agency workers cannot be required to work more than 40 hours a week when the hirer's equivalent employees are not required to work more than 40 hours.
- Agency workers cannot be asked to sign an opt-out from the 48-hour working time limit if the hirer's employees are not also asked to opt-out. (NB: it is unlawful for a hirer or an agency to pressurise anyone to opt out of the 48-hour working time limit).
- Agency workers cannot be required to work longer shift patterns than the hirer's equivalent employees.
- Agency workers cannot be offered only part-time work, when all the hirer's equivalent employees work full-time.

Rest breaks and rest periods

Agency workers who have qualified for equal treatment will be entitled to the same rest periods and rest breaks as the hirer's employees. For example, agency workers must not be allocated shorter lunch breaks or shorter weekly rest periods than the hirer's employees.

Night work

After completing the 12-week qualifying period, agency workers have the right to the same terms and conditions relating to night work[1] as if they had been directly recruited by the hirer to do the same job.

This means agency workers will have the right to equal treatment on:

- the length of night work
- enhanced pay rates relating to night work
- the allocation of night work, i.e. agency workers cannot be required to work nights when the hirer's employees are not required to work nights. Similarly, agency workers must have the same opportunity to work nights as the hirer's employees.

Pay relating to working time

After completing the 12-week qualifying period, agency workers have the right to the same pay relating to working time as if they had been directly recruited by the hirer to do the same job. This includes pay relating to:

- travel time during working hours, e.g. where care assistants are travelling between clients
- on-call, waiting time or standby payments
- sleeping-in payments, e.g. for agency workers in the health or care sectors.

1 Night work means any work done between 11pm and 6pm or a period of not less than seven hours that includes the period between midnight and 5am and which is determined by a working time agreement.

Section Five

Pay between assignment contracts – an exemption from equal pay

The AWR provide for one significant exemption from the right to equal pay.

Agency workers who have a permanent contract of employment with an agency and are paid between assignments will not have a right to equal pay. This is the case even where the agency worker has worked for 12 weeks in the same role with the same hirer. This exemption is sometimes referred to as the "Swedish derogation".

Pay between assignment contracts

For the exemption to apply, all the following conditions must be met:

1. The agency worker must be an "employee" of the agency

The exemption will only apply where an agency employs an agency worker on a contract of employment.

The exemption will not apply if an agency worker is given a "zero hours contract" or their contract states that the agency is not required to look for or to offer the individual work.

2. The contract of employment must be "permanent"

The exemption will only apply if an agency worker is employed on a so-called permanent contract of employment. This means the agency worker cannot be employed on a fixed-term contract.

3. The contract of employment must include certain terms and conditions

The contract between the agency and the individual must be agreed before the start of the first assignment, must be in writing and must include the following terms and conditions:

- the minimum pay rates and the method of calculating them
- the location or locations where the agency worker may be expected to work
- the expected hours of working during any assignment
- the maximum hours per week that an agency worker can be expected to work during any assignment
- the minimum hours per week that may be offered to an agency worker during any assignment – the agency worker must be guaranteed at least one hour of work a week
- the nature of the work that an agency worker can expect to be offered including any requirements relating to qualifications or experience.

The contract must also include a statement that by entering into the contract the agency worker will not have any entitlement, for the duration of the contract, to rights conferred by Regulation 5 of the AWR as far as they relate to pay. This statement means the agency worker will not have the right to equal pay even after 12 weeks in the same role for the same hirer.

4. The agency must try to find work for the agency worker

The agency must take reasonable steps to place the agency worker on a suitable assignment when they are between assignments and not working. A suitable assignment will be one where the nature of work and the terms and conditions are consistent with the terms of the agency worker's contract.

5. Pay between assignments

One of the most important conditions for this exemption is that an agency worker must be paid between assignments.

Between assignments, agency workers must be paid at least 50 per cent of the pay they received during the previous assignment. Fifty per cent of pay is calculated with reference to the highest pay rate the agency worker received on the previous assignment and the number of hours worked on the assignment[2]. Pay for these purposes only includes basic pay, including annual salaries, hourly or daily rates of pay, piece rates and performance-related pay. It will not include other forms of remuneration, including enhanced rates for overtime or unsocial hours working. However, the agency worker must not be paid less than the NMW rate for each hour worked on the previous assignment.

2 Where the previous assignment lasted more than 12 weeks, it will be the highest rate of pay received in the last 12 weeks.

Where an agency worker is usually paid on a monthly basis, their pay between assignments should be calculated on a monthly basis. Where they are normally paid on a weekly or daily basis, their pay between assignments should be calculated accordingly.

Remember that all the above conditions must be met for the exemption to apply. If one or more of the conditions are not met, then it is possible that the agency worker will be entitled to equal pay after 12 weeks in the same role with the same hirer.

Ending a "pay between assignments contract"

Agency workers cannot be dismissed unless they have been paid for at least four weeks during which they were not on an assignment and were not working. This rule applies whether an agency worker is made redundant or dismissed for misconduct or capability. (This is likely to include where the agency worker is dismissed for gross misconduct).

The four weeks do not need to be consecutive and can take place at any point (after the completion of the first assignment under the contract). They can also run concurrently with any notice period. However if an agency worker does any work on any assignment during a week, that week will not count towards the four weeks.

Access to employment rights

Most agency workers in the UK are categorised as "workers" for the purposes of employment law; they therefore lose out on key statutory employment rights. However, because agency workers employed under this exemption must be an employee of the agency, they will be entitled to key statutory employment rights. This will include rights to:

- statutory notice (after one month)
- maternity leave
- paternity leave and adoption leave; unpaid parental leave and request to work flexibly (after 26 weeks' continuous employment by the agency)
- paid time off for trade union duties or training
- protection from unfair dismissal (after one year's continuous employment by the agency)
- statutory redundancy pay (after two years' continuous employment by the agency).

Agency workers will need to decide whether access to such wider employment rights makes up for the loss of the right to equal pay.

The implications of pay between assignments for agency workers

The most important implication for an agency worker employed on a "pay between assignments" contract is that they will not have a right to equal treatment on pay as compared with employees directly recruited by a hirer.

They will, however, be entitled to other equal treatment rights including day-one rights to equal treatment relating to collective facilities and access to information about vacancies in the hirer's organisation and the right to equal treatment on holiday and working time entitlements after 12 weeks in the same role with the same hirer.

Some employers and agencies have argued that agency workers on "pay between assignments" contracts will not have the right to equal treatment on holiday pay. The TUC does not agree. Holiday pay is a term and condition relating to annual leave and not just a form of pay. Therefore agency workers who sign "pay between assignments" contracts should not lose the right to equal treatment on holiday pay.

Misuse of "pay between assignments" contracts

There is also a risk that unscrupulous agencies will seek to manipulate "pay between assignments" contracts to limit the amount of pay to which an agency worker is entitled between assignments. For example, unscrupulous agencies may draw up contracts which state that the hours that any agency worker will be expected to work on assignments may range from 2 to 48 hours a week and they will be entitled to be paid between the NMW rates and £15 an hour, depending on the nature of the assignment.

If the agency worker signs the contract, the agency could place the individual on a six-months' assignment during which the agency worker normally works 40 hours a week and is paid £8 an hour. The agency worker may be working alongside a hirer's direct recruits who do the same work but who earn £12 an hour. However the agency worker would not be entitled to equal pay after 12 weeks in the same role with the same hirer.

If towards the end of the six-month assignment, the hirer informs the agency that they no longer want to retain the agency worker to work at their site, the agency could place an agency worker on a new assignment where the agency worker is only required to work four hours a week and is paid the NMW.

At the end of the month's assignment the agency could seek to terminate the agency worker's contract. The agency therefore would not find the individual another assignment and instead would provide them with four weeks' notice during which the agency worker is entitled to be paid only four hours a week on NMW rates.

The government has recognised that there is a risk that "pay between assignment contracts" might be used inappropriately by agencies to avoid equal treatment rights. The BIS guidance for agencies and hirers states that agencies and hirers "should not structure arrangements in a way that deprives agency workers of the protection provided by pay between assignments. This could put them at risk of legal challenge."

The guidance provides examples of potential abuses which could be challengeable, including:

- employing agency workers on a contract for one hour a week
- a situation where the hours that an agency offers differ from the expected hours of work included in the contract.

The BIS guidance also states that: "If there is no permanent contract of employment between the TWA and agency worker which complies with the requirements of the derogation then the agency worker could be entitled to the equal treatment provisions under the Regulations which apply in the absence of such a contract. In the event of a successful claim, the [agency] (and/or the hirer) will be responsible for any breach (and associated penalties) to the extent that they are responsible for the infringement. This will depend on the circumstances of individual cases."

Tips for reps

Initial evidence indicates that there is interest in the use of "pay between assignment contracts" in some workplaces and sectors. Hirers in particular perceive the use of such contracts as a means of avoiding the costs and potential liabilities associated with equal treatment on pay. Agencies tend to be less keen on the use of this model as they are likely to have to bear the costs of paying agency workers between assignments.

Where a union is recognised by a hirer, reps should seek to discourage the hirer from agreeing to the use of "pay between assignments" arrangements. Reps can alert hirers to the potential risks of the misuse of these contracts, citing the BIS guidance above. Reps should point out to the employer that if "pay between assignments" contracts are misused, then the hirer could be liable for equal treatment on pay for agency workers from the point at which the agency worker completed the 12-weeks' qualifying period.

Where "pay between assignments contracts" are used reps should check that the contracts comply with the conditions outlined above. Where possible, unions should also seek agreement with the hirer and/or the agency that safeguards will be included in the "pay between assignments" contracts. For example:

- The minimum number of hours written into the contract should reflect the normal hours that agency workers are expected to work on an assignment in that particular sector, industry or workplace.
- Agency workers should be guaranteed the same total pay between assignments they normally receive while working on an assignment, or a substantial proportion of it.
- Agency workers should have a right only to be offered assignments and pay rates which reflect their skills, qualifications and experience. Agency workers should not be expected to undertake any work offered by the agency.
- The contracts should only specify the location or locations where the agency worker is willing to work.

Section Six

Qualifying for equal treatment

In summary

Agency workers will qualify for equal treatment on pay, and holiday and working time entitlements where they have worked for 12 calendar weeks in the same role for the same hirer on one or more assignments.

The qualifying period will be reset to zero and an individual will need to work for a further 12 weeks to qualify for equal treatment where the agency worker:

- has a break of more than six weeks during or between assignments (unless absence is for one of the permitted reasons, e.g. holidays, sick leave or family related leave, etc.)
- starts a new role with the hirer involving substantively different work and duties.

This section explains how the qualifying period is calculated and how it will work in practice. It also outlines the anti-avoidance measures which aim to prevent agencies and hirers rotating agency workers to circumvent equal treatment rights.

Working for multiple hirers

It is possible for agency workers to be qualifying for and to be entitled to equal treatment with more than one hirer at the same time. It is also not uncommon for HGV drivers to work for a variety of hirers in the same week. Similarly catering and cleaning staff often work regularly for more than one hirer.

It is important to be aware if an agency rotates an agency worker between more than one hirer in order to prevent them from qualifying for equal treatment, they may breach the anti-avoidance provisions (see below).

Supplied by more than one agency

An agency worker can qualify for equal treatment with a hirer even if they have been supplied by more than one agency. Provided an agency worker works in the same role for the same hirer for 12 weeks, it makes no difference if they have been supplied by multiple agencies.

It is likely that agencies will ask agency workers for a full work history when they first sign up.

Such information may be used by agencies to ensure agency workers receive equal treatment rights. The information may also be used to ensure that agency workers are not assigned to workplaces where they may qualify for equal treatment. Agency workers are not under a positive legal duty to provide information about their work history to the agency, but they are advised not to give false or misleading information.

Calculating the qualifying period

To qualify for equal treatment, agency workers must work for 12 calendar weeks in the same role for the same hirer on any one or more assignments.

If an agency worker does any work for a hirer during a week, even for a few hours, that week will count towards the 12-week qualifying period. Therefore agency workers working part time will qualify for equal treatment in the same amount of time as those working full time.

So if an agency worker works for two days in a calendar week and then takes one day's leave or one day's sick leave that week will still count for the purposes of the 12-week qualifying period.

The AWR do not define what is meant by a calendar week but it is likely that it will comprise a period of seven days starting with the first day of any assignment.

For example, if an agency work starts an assignment on a Wednesday, any work done by the agency up to and including on the following Tuesday will count as one calendar week.

Note: The AWR do not have retrospective effect. Any service accrued with a hirer before 1 October 2011 will not count. Therefore, the first date that an agency worker can qualify for equal treatment on pay, and holiday and working time entitlements – even those who have worked for years for the same hirer – is 24 December 2011.

The qualifying period as a 'stopwatch'

One way of explaining the qualifying period is to think about it as a stopwatch. Certain breaks during or between assignments or changes in the agency worker's role will mean that an agency worker's stopwatch is reset to zero and the qualifying period will start again.

However, the Regulations also recognise that the working patterns

for agency workers can be irregular and agency workers often do not work continuously for the same a hirer.

As a result, the AWR state that some breaks during the qualifying period will not reset the stopwatch to zero. Instead they will pause the stopwatch. In addition, some breaks for family related leave mean the stopwatch will continue to tick even though an individual is absent from work.

Reasons that reset the 'stopwatch' to zero:

An agency worker's stopwatch will be reset to zero and the qualifying period will start again:

- if there is a break of more than six calendar weeks at the end of or between assignments (and the reason for the break does not pause the qualifying stopwatch or mean that it continues to tick – see below)
- where an agency worker remains with the same hirer but starts a new role (see section on a new role below).

An agency worker's stopwatch will also be reset to zero if their assignment with one hirer comes to an end, they start work for a new hirer and do not return to the original hirer's workplace.

However, if the agency worker returns to work for the original hirer on a new assignment working in the same role within six weeks of the end of the last assignment, their qualifying stopwatch will be treated as if it had been paused. On returning to work with the original hirer, the stopwatch will start to tick again from the point it stopped when the agency worker left the assignment.

Breaks during or between assignments

Where an agency worker has a break of more than six weeks during or between assignments, their "stopwatch" will usually be reset to zero and the qualifying period will restart.

However, where the reason for the break is one of those listed below the stopwatch will be paused. When the agency worker returns to the same role with the hirer, the stopwatch will start ticking again from the point it stopped (i.e. an agency worker's service before the break is carried forward and treated as if it were continuous with their service after the break).

Types of breaks which cause the 'stopwatch' to pause

- a break of not more than six calendar weeks for any reason
- sickness or injury for up to 28 weeks. The agency worker will need to provide supporting medical evidence if required by the agency.
- where an agency worker is taking time off or using their leave entitlement, e.g. holidays or time off for trade union duties or training.
- jury service for up to 28 weeks
- a temporary cessation in the hirer's requirement for any worker to be present at the establishment and work in a particular role, for a predetermined period in line with

the hirer's custom and practice, e.g. because of an annual factory close down or school vacations. (A one-off and unexpected closure, for example due to a sudden and unexpected fall in demand or an office fire, is unlikely to be covered and an agency worker's stopwatch will be reset to zero.)

- any form of industrial action or a lock out at the hirer's workplace.

Breaks where the 'stopwatch' continues to tick

Where an agency worker is absent from work during or between assignments for a permitted family related reason the stopwatch will continue to tick (the individual is treated as if they continue to work).

The reasons for absence where the stopwatch continues to tick are:

- any period of pregnancy-related sick leave
- maternity leave of up to 26 weeks after the date of childbirth. (NB even where the agency worker does not have a statutory or contractual right to maternity leave their stopwatch will continue to tick for up to 26 weeks).
- any period of contractual or statutory maternity, paternity or adoption leave.

During family-related leave the stopwatch will continue to tick until the intended or likely end of the assignment, whichever is the longer.

These rules are best explained through the use of a practical example:

- A woman goes on maternity leave six weeks into an assignment which is expected to last for 11 weeks in total. The stopwatch will continue ticking for a further five weeks. This is because the agency worker is deemed to be working for the expected duration of an assignment. The agency worker is then assigned to work in the same role with the hirer after a period of 14 weeks' maternity leave. The interim period between the end of the 11-week assignment and her return to work is disregarded because the reason the agency worker was absent was maternity. After one week on the new assignment the woman will qualify for equal treatment.

For more information about the qualifying period where a pregnant agency worker is moved to suitable alternative employment with a new hirer due to health and safety risks, please see section nine.

Different types of consecutive leave

It is possible for absences for different reasons to run consecutively, for example periods of sick leave and holidays. The stopwatch will either pause or continue to tick depending on the reason for the absence.

Examples

- An agency worker has two weeks of sick leave at the end of an assignment and then there is a break of five weeks before they are placed on a new assignment in the same role with the hirer. When they start the new assignment they will not have to start a new qualifying period. Although altogether they have had a break of more than six weeks from the workplace, the stopwatch was paused during both the period of sick leave and the break of five weeks. The stopwatch will therefore continue to tick when they return to work. However if they was reassigned to the workplace seven weeks after the end of sick leave, the stopwatch would be reset to zero and they would need to start a new qualifying period. This is because the seven-week break for no permitted reason was longer than six weeks.
- A pregnant agency worker who has worked on a continuous assignment for eight weeks in an office goes on 20 weeks' maternity leave. Before they go they request and the agency and hirer agree to them taking three weeks' outstanding holiday at the end of their maternity leave. When they return to work in the same role for the hirer they will have the right to equal treatment. This is because the stopwatch continued to tick during the period of maternity leave and they qualified for equal treatment after four weeks of maternity leave. During their three weeks' holiday the stopwatch paused. Therefore they retained their right to equal treatment.

A new role with a hirer

To qualify for equal treatment on pay, holidays and working time entitlements, agency workers must work for 12 calendar weeks in the same role for the same hirer.

The AWR state that an agency worker will remain in the same role unless:

- the agency worker starts a new role with the hirer and
- the whole or main part of the new role involves substantively different work or duties and
- the agency has informed the agency worker in writing of the type of work they will be required to do in the new role.

If these conditions apply then the agency worker's stopwatch will be reset to zero and the qualifying period will start again.

What is a substantively different role?

In order to involve substantively different work or duties it is likely that:

- the role requires the use of a different set of skills
- the agency worker will require additional training or specific qualifications
- an agency worker receives a significantly different pay rate.

It is likely that in many workplaces, roles performed by agency workers will not be substantively different. Minor changes in an agency worker's work or duties are also unlikely to mean that their qualifying period will be broken

Effect of different breaks on the qualifying period 'stopwatch' – in summary

Type of absence which affects qualifying period	Effect on 12-week qualifying period
Agency worker remains with the same hirer but moves to a substantively different role	Stopwatch reset to zero
Break of more than six weeks during or between assignments (which is not for a reason which pauses the stopwatch or causes it to keep ticking)	Stopwatch reset to zero
Break for any reason for up to six weeks	Pauses the stopwatch
Sickness absence	Pauses the stopwatch for up to 28 weeks
Annual leave	Pauses the stopwatch
Workplace shut downs, e.g. factory Christmas breaks, school holidays	Pauses the stopwatch
Jury service	Pauses the stopwatch
Industrial action	Pauses the stopwatch
Pregnancy-related sickness during the actual or expected period of the assignment	Stopwatch keeps ticking
Pregnancy-related sickness after the end or expected end of an assignment	Pauses the stopwatch
Maternity-related absence during the actual or expected period of the assignment	Stopwatch keeps ticking for up to 26 weeks from the date of childbirth
Maternity-related absence after the end or expected end of an assignment	Stopwatch is paused for up to 26 weeks from the date of childbirth
Contractual or statutory maternity, paternity or adoption leave during the actual or expected period of the assignment	Stopwatch keeps ticking
Contractual or statutory maternity, paternity or adoption leave	Pauses the stopwatch

and the stopwatch reset to zero, for example where:

- An agency worker's line manager changes but they continue to perform the same role.
- An agency worker moves to a new department or division or location within an organisation but continues to do the same or similar work.
- An agency worker is required to work on a different shift but is still doing similar work, for example they move from the early shift to a late shift.

Examples:

- An agency worker works in a food processing firm and moves from the production line to the packing department. The agency worker does not require significant additional training to work in the packing department and therefore the new role is not substantively different and the stopwatch is unlikely to be reset to zero.
- An agency worker moves from working as a catering assistant in a workplace cafe to working as an administrator in the finance department. The skills required for an administrator in the finance department are substantively different. The stopwatch is likely to be reset to zero and the agency worker will start a new qualifying period.

An agency worker's qualifying period is only likely to be reset to zero where the majority of an agency worker's work and duties in the new role differ from the previous role. If an agency worker is asked to take on limited additional duties, and continues to perform their original role, it is unlikely that the stopwatch will be reset to zero. For example:

- An agency worker is assigned to a hotel to work as a head waiter. After two months they are also asked occasionally to cover the reception when the receptionist is on a break. The agency worker will not have started a new role because more than half of their time is spent as a waiter in the restaurant.

Written notice of a change in the type of work

Where an agency worker moves to a new role but is not informed in writing by the agency about the type of work they will be doing in the new role, then the agency worker's qualifying period will not be broken and the stopwatch will not reset to zero.

In most instances, the process will start when the hirer informs the agency that the agency worker's role is to change substantively and provides details about the job requirements, as required by the Conduct Regulations 2003. The agency will then inform the agency worker in writing. The agency worker also has the right under the Conduct Regulations to be informed of the skills which are required to perform any changed assignment. Agency workers and reps should be able to use this information to assess whether the agency worker has genuinely started a substantively different role.

A new hirer

In order to qualify for equal treatment on pay and holiday and working time entitlements, an agency worker must

work for 12 weeks in the same role for the same hirer. Where an agency worker stops working for one hirer and starts an assignment with a new hirer, an agency worker's qualifying period will be broken and the stopwatch will be reset to zero. A new hirer must be a different person or a different legal entity.

In most cases it will be clear where the agency worker has started working for a new hirer. Where an agency worker moves to work in a different department or division of a company they will not be working for a new hirer provided the department or divisions does not have a separate legal identity. Similarly, the fact that an agency worker is hired by a different manager or their assignment is paid for out of a different budget will not mean that there is a new hirer or that the stopwatch is reset to zero.

Where a hirer is part of a larger group of companies which are connected and an agency worker starts an assignment with a different part of the group which has a separate legal identity, the qualifying period will however be broken and the stopwatch reset to zero.

Where an agency worker has qualified for equal treatment

Where an agency worker has already completed the qualifying period they will nevertheless lose the right to equal treatment on pay, holidays and working time entitlements if:

- there is a break of more than six weeks during or between assignments unless the reason for the absence is one of the permitted reasons listed above, for example, holidays, sick leave, or family related leave
- they start a substantively different role (as defined above) with a hirer.

In these cases, the agency worker will need to work for 12 weeks in the same role for the same hirer to qualify again for equal treatment.

Anti-avoidance measures

The AWR include provisions designed to prevent hirers and agencies from hiring agency workers on a succession of assignments or from rotating agency workers within an organisation in order to prevent them from qualifying for equal treatment rights.

The anti-avoidance provisions apply:

- if an agency worker has been moved to more than two substantively different roles with the hirer (or within a company associated with the hirer) or they have been hired on a succession of more than two assignments with a hirer and
- the most likely reason why they were rotated or hired on the succession of assignments was because the agency or hirer (or associated company) intended to prevent them from qualifying for equal treatment and
- they would have qualified for equal treatment if they had not been moved or hired on a succession of assignments.

It will be up to an employment tribunal to determine whether the agency, hirer or associated company was deliberately attempting to circumvent the equal treatment rights. In making this decision, employment tribunals will need to take into account a range of factors including the length of an agency worker's assignments with a hirer, how often the agency worker returns to the same role with the hirer, the period between assignments and the nature and length of the assignments with associated companies.

The following examples are taken from the BIS guide for hirers and agencies:

- *An agency worker acting as a supply teacher moves from one assignment to a separate assignment with another school without any break (or the break is no more than six weeks). The agency worker has not worked for either school since the introduction of the Regulations so there are no previous assignments to consider. If the second school has a separate legal identity then the qualifying period starts again as it is with a new hirer. If both schools are part of the same legal entity then the qualifying period continues.*
- *An NHS trust hires agency workers to work within its hospitals. Assuming the NHS trust is a single legal entity, the qualifying period will continue to tick if an agency worker moves from one hospital to another within the trust where there are no breaks between assignments or the break is no more than six weeks.*
- *An agency worker is supplied to a number of different government departments as a PA. The qualifying period would continue to tick if the agency worker moved from one department to another to work as a PA as it is the same legal entity, subject to any breaks between assignments that the agency worker takes.*

Where an employment tribunal decides that a hirer or agency has breached these anti-avoidance provisions, they can award an agency worker up to £5,000.

Tips for reps

It will be essential for reps to monitor if agencies and hirers are attempting to avoid equal treatment rights by rotating agency workers or employing them on a succession of separate assignments. Reps should encourage members to keep a detailed record of their assignments and to retain any written information provided by the agency including written statements detailing assignments.

There is nothing in the Regulations which means it is unlawful for a hirer to lay off an agency worker after 11 weeks and to replace them with another agency worker. However, if an agency worker works on more than two assignments or has worked in more than two substantively different roles for the same hirer, then the anti-avoidance protections may help them to win equal treatment.

Section Seven

Equal access to collective facilities and amenities

From day one of an assignment, agency workers have the right to be treated no less favourably than a comparable worker in relation to collective facilities and amenities provided by the hirer. Hirers are solely responsible for this right.

This right will cover collective facilities provided by the hirer for all or a group of workers. It is also not limited to facilities on the hirer's own site. Off-site facilities should also be covered if they have been provided by the hirer.

What are collective facilities and amenities?

Agency workers are unlikely to have a right to equal treatment on all benefits provided by the hirers.

Collective facilities and amenities will include:

- a staff canteen or similar facilities, including subsidised food and drink at the same rate as provided to the hirer's employees
- crèches
- transport services, including local pick-up and drop-off services; transport between sites; complimentary night transport for workers on a late shift (see below for discussion on travel loans)
- car parking, including subsidised spaces in a local municipal car park
- toilets
- shower facilities
- mother and baby rooms
- prayer rooms
- rest rooms
- accommodation for workers who are required to sleep on site
- common rooms
- food and drink machines
- on-site gyms

The BIS guidance on the AWR states that this right will not apply to season ticket loans, company cars or petrol allowances where agency workers use their own car to undertake work. It also states that agency workers will not have the right to equal treatment in relation to subsidised membership of off-site gyms, because these represent benefits rather than collective facilities. The TUC is not convinced by these arguments. However, it will ultimately be for the courts and tribunals to decide whether this right applies to such services and facilities.

Where there is a waiting list for a facility, for example car parking spaces, agency workers will not have a right to preferential treatment, i.e. they will need to join the waiting list in the same way as direct recruits. This may mean agency workers on shorter assignments do not benefit in practice from the facility. Similarly, if an employee can only use a facility after working for the hirer for a period of time, the same service requirement can apply to agency workers.

Finding a comparator

Agency workers have the right not to be treated less favourably than a comparable worker or employee. The agency worker and the comparator must be working for and under the supervision and direction of the hirer, and be doing the same or broadly

similar work. Where relevant, they should also have a similar level of skills and qualifications. The comparator should also be working in the same establishment as the agency worker. However, where there are no suitable comparators in their workplace, the agency worker can use a comparator working in another establishment owned by the hirer.

When can a hirer refuse equal treatment?

A hirer can only treat agency workers less favourably in relation to collective facilities and amenities when they can demonstrate that the different treatment is objectively justified.

This means:

- The treatment is to achieve a legitimate objective, such as a genuine business or operational need.
- The treatment is necessary to achieve that objective.
- The treatment is a proportionate way to achieve that objective.

There are likely to be very limited circumstances where hirers can justify not providing agency workers with access to a collective facility. Hirers are unlikely to be able to rely on the cost alone when seeking to justify discrimination against agency workers.

An example of where an organisation may be able to justify less favourable

treatment is where the hirer has limited places in a workplace crèche and these are usually allocated to employees who require a place for their children for at least one year. In such a situation, the hirer may be able to justify excluding agency workers working on short-term assignments. However, the hirer should still permit agency workers on long-term assignments to use the crèche.

Tips for reps

Reps should ask hirers to carry out an audit of all collective facilities and amenities they provide and seek agreement that agency workers will automatically gain access to these facilities from the first day of any assignment.

Some hirers may attempt to introduce qualifying periods for some collective facilities in order to avoid equal treatment rights. For example, they may propose that employees can only use workplace gyms after one year's employment. Such changes will arguably reduce terms and conditions for existing staff and will demotivate staff. Reps may also point out to employers that current agency workers may become the permanent employees within the organisation. (This is more likely to be the case where hirers only select new recruits via agencies.) Therefore it makes sense to make the agency worker feel welcome and integrated into the organisation from day one.

Section Eight

Opportunity to apply for vacancies

Right to apply for vacancies

From day one of any assignment, agency workers have the right to be informed by the hirer of any vacant posts in the hirer's organisation so that they have the same opportunity as a comparable worker to find permanent employment with the hirer. The hirer is solely responsible for this right.

The agency worker and the comparator must be working for and under the supervision and direction of the hirer, and be doing the same or broadly similar work. Where relevant, they should also have a similar level of skills and qualifications. The comparator should also be working in the same establishment as the agency worker. Agency workers cannot compare their treatment to that of workers in another workplace owned by the hirer.

Hirers can decide how they advertise jobs. This may be through e-mail, an intranet site, through a company newsletter or displaying details on a notice board. However, it is essential that agency workers have access to this source of information. Hirers must permit agency workers to apply for relevant vacancies. The only exception will be in a redundancy situation where an employer decides to ring-fence certain posts for deployment opportunities for staff otherwise at risk of redundancy. Hirers will still be able to require certain qualifications, skills or experience when advertising posts.

Bargaining for permanent employment for agency workers

The implementation of the AWR may create an opportunity for union reps to encourage employers to reconsider their deployment strategies and their use of agency workers. Even where agency workers are paid less per hour, it often costs hirers more to use agency workers than to recruit staff directly. This is due to the fees paid to the agency. Reps may be able to make the case that it would be more cost-effective for an organisation to employ staff on a permanent or fixed-term basis. Recruiting staff directly is also likely to contribute to better team-working, improved motivation and productivity.

Where possible, reps should seek to agree policies with employers on the use of agency workers. These policies could include measures such as:

- Where an agency worker has been in post for more than 12 weeks, employers should consider offering the individual permanent employment.
- Where a vacancy is expected to last for more than six months, employers should recruit staff directly on a permanent or fixed-term basis.

Section Nine

Pregnancy rights

Agency workers who are pregnant and are "employees" of an agency or a hirer already benefit from basic health and safety protections from day one of their employment. This includes rights to paid time off for ante-natal appointments and to be offered a suitable alternative assignment where they are unable to continue working in their current assignment due to health and safety risks.

The AWR extends these rights to agency workers who are "workers", but only after they have completed the 12 weeks' qualifying period.

Please see section 13 for more information about the factors which determine if an agency worker is an "employee" or a "worker".

Ante-natal appointments

Pregnant agency workers will be entitled to reasonable paid time for ante-natal appointments. As noted above for agency workers who are "employees" this is a day-one right. Agency workers who are classified as "workers" will need to complete the 12-week qualifying period before benefitting from the right.

Agency workers who qualify must be paid for each hour that they missed during the assignment. This will include time spent getting to and from the appointment and waiting times in busy clinics. They must be paid their current hourly rate during time off for ante-natal appointments. When the agency worker works irregular hours or their pay rate varies, they will be entitled to the average hourly pay rate they received in the previous 12 weeks.

An agency worker can be required to provide evidence of their appointment, for example, a certificate from a registered medical practitioner/midwife/nurse and for confirmation of the ante-natal appointment through, for example, an appointment card. This does not apply to the first such appointment where it is recognised that the agency worker may not have any written confirmation of the appointment.

Alternative work

Agency workers will also have the right to be offered a suitable alternative assignment where they are unable to

continue working in their assignment due to health and safety risks, or to be suspended on full pay where a suitable alternative assignment is not available. For agency workers who are "employees" this is a day-one right. Agency workers who are classified as "workers" will need to complete the 12-week qualifying period before benefitting from the right.

An agency worker who qualifies will need first to inform the agency that she is pregnant. The agency may then approach the hirer requesting a health and safety assessment for the current assignment. Risks might include, work involving exposure to heat, chemicals, standing for long periods, lifting heavy loads. These factors may be relevant particularly to agency work in catering, cleaning, manufacturing, retail and distribution and social care.

If a risk is identified, the hirer is under an obligation to make adjustments to remove it. If this is not possible, the agency should offer the agency worker suitable alternative work either in the hirer's workplace or elsewhere. Suitable alternative work must be consistent with the work on the previous assignment and must be paid at a rate which is no less favourable.

Agencies will only be required to find an agency worker suitable alternative work until the agency worker leaves to have her child or for as long as the original assignment would have lasted or was expected to last, whichever is the longer.

If the agency is unable to find the agency worker suitable alternative work, the agency worker has the right to be suspended and to continue to be paid by the agency on their normal rate of pay from the previous assignment until the agency worker leaves to have her child or for as long as the assignment would have lasted or was expected to last, whichever is the longer.

The effect of an alternative assignment on the qualifying period

Where an agency worker is moved to suitable alternative assignment with a new hirer for health and safety related reasons, the agency worker will:

- continue to accrue service with the original hirer until the end or expected end of the assignment which they moved from and
- start a new qualifying period with the new hirer.

Other relevant statutory rights

An agency worker who is pregnant, has recently given birth or is breastfeeding is entitled to an individual risk assessment to ensure there is no harm to herself or her baby from the working conditions, processes or chemical agents used in a workplace under the Management of Health and Safety at Work Regulations 1999.

Agency workers who are pregnant or who have recently given birth may also have additional rights to protection under the Equality Act 2010. Situations where agency workers may have a claim for pregnancy discrimination under this Act include where a pregnant agency worker is:

- disciplined for taking too many toilet breaks
- penalised for sickness absence that arises from her pregnancy
- denied an individual risk assessment.

Agency workers who are not employees do not have a statutory right to maternity leave, i.e. they do not have a right to return to their substantive job. However, where an agency worker has been absent for reasons connected to childbirth and then seeks to return to work, she may have a claim for sex discrimination under the Equality Act if the agency or hirer refuses to permit her to return to her original assignment or to consider her for other assignments because of her pregnancy or maternity absence.

Pregnant agency workers may be entitled to 39 weeks' Statutory Maternity Pay (SMP) during any maternity absence if the agency has responsibility for paying them and deducts tax and National Insurance (NI). They would also have to meet the other qualifying criteria for SMP of 26 weeks' continuous service by the fifteenth week before the week in which the baby is due and have average earnings that are at least equal to the lower earnings limit for NI. If they do not qualify for SMP they may be entitled to claim Maternity Allowance (MA) benefit for 39 weeks. The DirectGov website has useful information about SMP and MA: *www.direct.gov.uk*

Tips for reps

Union safety reps should seek to ensure that risk assessments are regularly conducted for all jobs which are filled by agency workers and the hirer's employees or workers.

Where a hirer identifies risks for a pregnant agency worker, reps may try to identify alternative suitable work for agency workers on site.

Where pregnant agency workers are moved to suitable alternative work, it may be difficult for the union to represent the agency worker, unless the union has recognition in the new workplaces.

Reps should however encourage members to keep detailed records relating to their pay rates and the type of work they are required to do on their new assignment.

Section Ten

Disclosure of information to union reps

Rights to disclosure of information

The AWR extends the existing rights for recognised trade unions to receive information from an employer for the purposes of collective bargaining or consultation on collective redundancies, TUPE transfers and under wider consultation rights arrangements, including European Works Councils.

Types of information

Under section 181 of the Trade Union and Labour Relations Act 1992, unions have the right to receive information that relates to the matters and the descriptions of workers for which the union is recognised. The Acas Code of Practice lists examples of information that may be relevant depending on the collective bargaining situation in a workplace. These include:

Pay and benefits: Job evaluation and grading systems; earnings and hours by relevant work-group, grade, plant, department or division, giving appropriate distributions and make-up of pay, including basic rate or salary; benefits and total pay bill; details of fringe benefits and non-wage labour costs.

Conditions of service: Policies on recruitment, redeployment, redundancy, training, equal opportunity and promotion; appraisal systems; health, welfare and safety matters.

Workforce: Numbers employed analysed according to grade, department, location, age and sex; labour turnover; absenteeism; overtime and short time; manning standards; planned changes in work methods, materials, equipment or organisation; staffing plans; investment plans.

Performance: Productivity and efficiency data; savings from increased productivity and output, return on capital invested; sales and state of order book

Financial: Cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.

The AWR extend the information which should be disclosed by employers to recognised unions. From 1 October 2011, unions will have the right to receive information about:

- the numbers of agency workers used by the hirer
- the location of the agency workers
- the type of work done by the agency workers.

It is also likely that recognised unions will be able under existing legislation to request information from an employer about agency workers' pay and conditions and the costs associated with hiring agency workers.

The extended right to disclosure should assist unions to assess the level of agency working and the length of average assignments for different types of job and to negotiate a better deal at work for agency workers.

Unions may also be able to use information from the hirer to make the case that it would be more cost-effective for organisations to employ staff directly on permanent or fixed-term contracts, rather than via an agency.

Limits on the information which must be provided

It is important to note that reps can only request the information where it relates to an issue on which a union is recognised for the purposes of collective bargaining. Employers are also only required to disclose information to representatives of the union who are authorised to conduct collective bargaining.

Employers are only required to provide information which is in their possession or that of an associated company. Employers can refuse to provide information which is confidential or commercially sensitive. However, in many workplaces, unions and employers have a relationship of trust. If employers provide reps with information which they request is to be treated as confidential, reps should respect this.

In addition, an employer is only obliged to provide information:

- without which a trade union rep would be impeded to a material extent in bargaining
- the disclosure of which accords with good industrial relations practice.

According the Acas Code of Practice, the absence of information is more likely to impede bargaining to a material extent if the information would influence the formulation, presentation or pursuance of a claim by a union or the conclusion of an agreement.

Tips for reps

Union reps should seek to agree a procedure for disclosure of information with the employer, covering the type and timescale for the disclosure of information. Reps should receive regular and up-to-date information about the use of agency workers. The information should also be provided well in advance of negotiation meetings and in a format which is easily accessible for reps. There should also be an internal disputes procedure.

Enforcing rights to disclosure of information

Where an employer refuses to provide information to a recognised union, the union can complain to the Central Arbitration Committee (CAC). If the CAC uphold the complaint they can order the employer to disclose the information and specify the time period in which this should be done. If the employer then fails to comply with this order, the union can go back to the CAC and make a claim for improved terms and conditions. If the second complaint is upheld by the CAC, the committee can make an award for improved terms and conditions as it considers appropriate. This award would have effect as part of the contract of employment.

Section Eleven

Representing agency workers

Agency workers, like all other workers, enjoy basic trade union rights.

Right to join a union

The law protects the right of agency workers to be a member of a trade union and to take part in union activities.

It is unlawful for an agency to refuse any of its services, including job search services and offering an assignment to an individual because they are:

- a member of a trade union
- unwilling to accept a requirement to stop being a member of a union or not to become a member of union in the future.

It is also unlawful for an agency to subject an agency worker to a detriment because they are a member of a trade union or because of their trade union activities. Examples of a detriment may include the refusal to offer an assignment; the early termination of an assignment; reducing pay and conditions; refusing promotion; dismissal.

It is unlawful for an agency to seek to induce an agency worker to opt out of trade union membership or a collective bargaining agreement. It is also unlawful for an agency to discriminate against an agency worker on the basis of information contained in a blacklist.

Tips for reps

Reps should contact a regional or national officer if they suspect that a member has been victimised because of their trade union membership or activities.

Right to union representation

An agency worker, like any other worker, has the right to be accompanied by a union rep or a colleague in a formal grievance and disciplinary hearing. For more information on when the right to be accompanied applies, see TUC Basic Rights at Work website: *www.tuc.org.uk/workplace/tuc-19823-f0.cfm*

Under the Acas Code of Practice, employers and agencies are only required to provide grievance procedures for "employees". However it is good practice for agencies and hirers to permit all workers to use grievance procedures to deal with problems at work. Some unions have gained agreement from agencies and/or hirers that agency workers can use their grievance procedures to raise problems at work.

Extending grievance procedures to agency workers – making the case

The implementation of the AWR should create a clear incentive for agencies and hirers to extend grievance procedures to agency workers. The use of grievance procedures can help to resolve problems relating to equal treatment rights for agency workers at an early stage and will avoid the need for employment tribunal proceedings.

Reps can remind hirers that they have a responsibility to ensure agency workers benefit from their rights under the AWR. Hirers are solely responsible for ensuring agency workers receive equal treatment on collective facilities and are provided with information about vacancies in their workplace. Hirers may also be found liable for breaches of equal treatment rights on pay, and holiday and working time entitlements, where an employment tribunal finds the hirer was responsible.

There is therefore a strong case for hirers to extend their grievance procedures to agency workers and to resolve any problems at an early stage. This will help to avoid the escalation of disputes and unnecessary legal costs.

Collectivising grievances

Agency workers are often reluctant to complain about their treatment at work because they fear losing their job.

Where an agency worker raises an issue which is likely to affect a group of agency workers, for example problems taking holidays or failure to be paid the right rate for the job, reps may consider dealing with the issue through a collective grievance procedure or negotiations with the agency or the hirer.

Right to union recognition

Agency workers also have a statutory right for their union to be recognised, where the majority of agency workers support it. However, a union will need to seek statutory recognition with the agency, rather than the hirer.

For example, in 2005 PCS was awarded statutory recognition for agency workers working in the British Cattle Movement Service in Workington.

Some unions have also succeeded in gaining voluntary recognition with agencies to bargain on behalf of agency workers. For example:

- The CWU is recognised by a number of high street agencies including Manpower and Adecco who supply agency workers in the telecommunications sector.
- Unite is also recognised by Manpower in the road transport sector. Union reps are permitted to attend induction meetings with new recruits.

Unions have also used their existing collective bargaining arrangements with hirers to negotiate for improved working conditions for agency workers.

Section Twelve

Enforcing agency worker rights

The new rights for agency workers will be principally enforced by employment tribunals. As with most statutory rights, there is a 12-week time limit for claims to an employment tribunal.

Reps should contact their regional official if they believe that a member's rights have been breached and there may be need for an employment tribunal claim.

Requesting a written statement

Before making an employment tribunal claim, agency workers who consider that their rights have been breached can request written information from the agency/hirer.

If the agency worker's complaint relates to their day-one rights (e.g. to use collective facilities provided by the hirer or to receive information and to apply for vacancies), the agency worker must write to the hirer seeking a written statement.

The hirer must respond with 28 days giving information relating to collective facilities provided in the workplace and processes for informing workers about vacancies. Where the hirer plans to use a comparator, they must explain why the individual is an appropriate comparator. They must also explain whether or why the agency worker has been treated differently from their own employees.

If the complaint relates to equal treatment on pay, or holiday or working time entitlements, the agency worker must first write to the agency. The agency worker should provide a written statement detailing the terms and conditions relating to pay, holidays and working time entitlements in the hirer's workplace; how the agency worker's pay and conditions were determined. Where the agency plans to use a comparator to defend equal treatment rights, the agency must explain why the individual is an appropriate comparator. If the agency does not respond within 30 days, the agency worker can write to the hirer who must respond in 28 days.

Who is liable?

Hirers are solely responsible for agency workers' rights to equal treatment on collective facilities or their right to receive information about vacancies.

Employment tribunals can find that either the hirer or the agency is liable for breaches of equal treatment rights to pay, holidays or working time, depending on who is responsible for the failure to provide equal treatment.

Tribunal awards

When an employment tribunal decides that an agency worker's rights under the AWR have been breached, they award the agency worker at least two weeks' pay. When an agency worker successfully demonstrates that the anti-avoidance measures have been breached the tribunal will be able to award up to £5,000 in compensation.

Section Thirteen

Employment status

As with all employment rights, whether an individual benefits from new equal treatment rights will depend on their employment status. This section explains the factors which will determine whether an individual is a 'worker', an "employee" or "self-employed".

Agency workers as "workers"

"Workers" will have a contract to perform work or provide services personally with the agency. It is likely that an agency worker will be a "worker" if most of the following factors apply:

- The individual's contract does not state that they are an employee of the agency.
- The individual has a zero-hours contract with the agency (i.e. their contract with the agency does not guarantee that the agency will find them work).
- The individual can decide whether or not to accept or refuse an assignment.
- The agency pays their wages and deducts tax and national insurance.
- The agency pays them holiday pay.
- The individual can leave the agency without giving notice or very little notice.
- The individual is expected to do their work themselves.

Agency workers as "employees"

Sometimes agencies will give a contract of employment to agency workers. If an individual's contract uses phrases such as "employee" or "contract of employment" the individual is likely to be an employee of the agency. Agency workers employed on "pay between assignments" contracts and who lose out on equal pay will need to be employees of the agency (see section five).

Otherwise, an individual is unlikely to qualify as an employee of the agency because of the agency's lack of control over the work the agency worker does while on an assignment.

Agency workers who are self-employed

If most of the following factors apply to an agency worker it is likely that they are self-employed and running a business on their own account:

- The individual bids or provides quotes to secure work and then submits invoices to receive payment.
- The individual has specific jobs or targets to complete, although they decide when and how to do the work.
- The individual does not have to carry out the work personally – they can hire another person to do the work or hire other helpers at their own expense.
- The individual is not under the direct supervision of the hirer or agency when they are working.
- The individual is responsible for meeting any losses, as well as taking profits from their own work.
- The individual is not entitled to receive any holiday pay or sick pay when they are unavailable for work.
- The individual provides major items of equipment or materials that are a fundamental requirement to complete a job.
- The individual has to correct unsatisfactory work in their own time and at their own expense.

The use of "bogus" self-employment

In recent years, unscrupulous employers and agencies have sought to employ individuals on a "bogus" self-employment basis in order to avoid employment rights obligations. Such practices are widespread in the construction and distribution sectors, and are becoming more prevalent elsewhere.

The tactics used by employers have included the insertion of substitution clauses into contracts. Employers then argue that an individual is self-employed as they can use a substitute to complete their work even though this never happens in practice. In a number of cases, the construction unions have successfully demonstrated that substitution clauses can be a sham and therefore are void.[3] Other employers try to claim that people are self-employed because they use some of their own tools to do their work (e.g. a painter and decorator using their own paint brush). Tribunals and courts are more likely to decide a person is self-employed if they provide major pieces of equipment necessary to do their job.[4]

Some employers simply label an individual as self-employed, even though they have all the characteristics of employees. When deciding a person's employment status and whether they are covered by the AWR the tribunals and courts will consider their working relationship in full to determine if they are genuinely self-employed.

3 *Redrow Homes (Yorkshire) Ltd V Buckborough* 2009 IRLR 34

4 *Torith Ltd v Flynn*, EAT, 21 November 2002 as reported in the IDS Brief 728, March 2003.

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