

The Agency Workers Regulations 2010 and Their Impact in the UK

October 25, 2011

Introduction

The Agency Workers Regulations (the "**Regulations**") came into force in the UK on 1 October 2011. The Regulations are UK legislation implementing a European Directive. The purpose of the Regulations is to give protection to temporary workers who are hired through employment agencies (called "**Agency Workers**" in the Regulations) and who, absent the legislation, miss out on protections afforded to other workers because they are neither employed by an employment agency (called a "**Temporary Work Agency**" in the Regulations) nor the business to which they are assigned (called the "**Hirer**" in the Regulations).

This briefing contains a high-level summary of the Regulations together with some suggested steps that businesses can take to comply with them.

The Rights of Agency Workers

As a result of the Regulations, Agency Workers will have the following new rights:

- **A Hirer must ensure that all its Agency Workers can access its collective facilities and amenities from the first day of their assignment.** For these purposes, collective facilities and amenities are stated to include (without limitation) the following: canteen or other similar facilities; child-care facilities; and the provision of transport services. They would also include comparable types of facilities (e.g., prayer rooms, sports facilities and coffee machines). However, a Hirer is not required to provide any particular facility or amenity to an Agency Worker where it can objectively justify not doing so. Examples of objective justification may include security issues and other compelling practical and organisation reasons. Liability for failure to comply with this obligation primarily rests with the Hirer.

- **A Hirer must ensure that all its Agency Workers have access to information about its job vacancies from the first day of their assignment.** This requirement can be satisfied by having a notice board that has details of available vacancies (there is no need to go so far as to individually inform every Agency Worker about every vacancy). Liability for failure to comply with this obligation primarily rests with the Hirer.
- **An Agency Worker is entitled to the same "*basic working and employment conditions*" to which they would have been entitled had they been directly recruited by the Hirer.** Importantly, this entitlement does not apply until an Agency Worker has undertaken the same role, whether on one or more assignments, with the same Hirer for 12 continuous calendar weeks. For these purposes, basic working and employment conditions means: pay, holiday, working hours and rest breaks. The meaning of "pay" is further clarified to expressly exclude certain benefits including: retirement benefits, insurance benefits, maternity and paternity rights, sick pay, bonus payments (unless they are direct commission payments or otherwise directly attributable to the amount or quality of work done), and stock awards. Very broadly, if an Agency Worker does work that is comparable to that done by a permanent employee, after the expiry of the twelve-week qualification period, the Agency Worker is entitled to basic working and employment conditions that are the same as those enjoyed by the permanent employee. There is scope for both a Hirer and Temporary Work Agency to be liable for a breach of this obligation.

The Meaning of Agency Worker and Temporary Work Agency

Broadly, an individual needs to satisfy four criteria to be an Agency Worker. Namely:

- they must be engaged to work temporarily (i.e., for a fixed-period of time);
- the work they do must be under the supervision and direction of the Hirer (i.e. they have to do what the Hirer tells them). Under English law, this distinguishes them from the self-employed (e.g., contractors or consultants), who, in order to be genuinely self-employed are not deemed to be under the supervision and direction of the Hirer;
- the individual must have a contract (either express or implied) to perform work for a Temporary Work Agency (through a contract of employment or any other contract to perform work or services); and

- neither the Hirer nor the Employment Agency is the client or customer of the individual (i.e., in the way that a Hirer might be the client of a management consultant carrying out an assignment for the Hirer while working from the Hirer's offices).

The Regulations contain a very broad and technical definition of Temporary Work Agency. In most cases, it is practical to work on the assumption that any entity in the business of supplying a Hirer with workers for fixed periods of time would constitute a Temporary Work Agency for the purposes of the Regulations and that, for most Hirers, the key will be to determine whether the workers supplied fall within the definition of Agency Workers.

Suggested Practical Steps for Hirers

Some suggested practical steps for potential Hirers to comply with the Regulations include the following:

- **Identify which workers are Agency Workers:** In most cases, it should be relatively straightforward to identify such workers. However, there may be some gray areas in relation to those deemed to be self-employed contractors or consultants.
- **If not doing so already, provide Agency Workers with access to the same facilities and amenities as its employees:** This may have cost as well as logistical implications. Consideration may need to be given to whether a failure to provide any particular facilities and amenities is desirable and can be objectively justified.
- **Implement a system for providing access about job vacancies to Agency Workers:** This can be achieved through a notice board or via email or text alerts to Agency Workers.
- **Carry out a compliance audit:** The issues covered by such an audit should include:
 - Determining which (if any) permanent employees carry out comparable work to identified Agency Workers, and if so, whether there is any disparity between the basic working conditions of Agency Workers and those of the

comparable permanent employees;

- Reviewing the terms of contracts with Temporary Work Agencies to ascertain what provisions (if any) exist that mean that the agencies meet the cost (or a proportion thereof) of any changes required in order to comply with the Regulations;
- Ascertaining what changes need to be made to the terms enjoyed by Agency Workers in order to comply with the Regulations;
- Evaluating the potential cost of making such changes;
- Assessing the best way of cooperating with Temporary Work Agencies to implement such changes, particularly having regard to: the terms of any contracts with such agencies and the apportionment of any additional costs; the scope to negotiate changes to relevant contracts; and the exposure to liability for any breaches of the Regulations on the part of both the Hirer and the Temporary Work Agency).

Tax

Finally, remember that the tax position in relation to Agency Workers often needs careful consideration. Responsibility for the taxation and National Insurance Contributions of Agency Workers will depend on who actually pays the agency worker, and in some circumstances, the jurisdiction of the Temporary Work Agency.