

Agency Workers Regulations (AWR) **An update from Parkside Recruitment Limited**

What is the AWR?

This EU directive takes effect from 1 October 2011 and provides "agency workers" with the right to equal treatment versus a comparable permanent employee of the hirer.

Who is a "temporary work agency"?

All intermediaries in the supply chain i.e. recruitment agency, umbrella company personal service company etc.

Who is an "agency worker"?

An agency worker is an individual who is supplied by a temporary work agency to work temporarily for, and under the supervision and direction, of the hirer.

Who is a comparable permanent employee of the hirer?

- A permanent employee of the hirer doing similar work as the agency worker, or
- A deemed employee of the hirer assuming the agency worker was engaged directly by the hirer - no need to identify actual "flesh and blood" comparator "deemed" comparator information is sufficient e.g. pay scales, or
- If the role and work undertaken by the agency worker is so unique there is no comparator then there are no AWR obligations for equal pay and working conditions (the other rights remain).

What rights does an agency worker have under AWR:

1. Rights from day one:

- Access to on-site facilities that a comparable permanent employee has, e.g. canteen child care, car parking/transport
- The right to be informed of relevant internal and external vacancies (same opportunity as comparable workers) unless due to a reduction in headcount
- Paid time off for ante-natal care
- The right to suitable work if pregnant, or paid time off for the remainder of the assignment.

2. Rights after a 12 week qualifying period:

Principle: entitled to the same "basic" working and employment conditions as a comparable permanent employee doing the same/broadly similar work

"Basic" rights include:

- pay
- working time night work
- rest periods/rest breaks/lunch breaks contractual annual leave entitlement

What does "pay" include (i.e. an agency worker has the right to receive comparable "pay"):

- wages/salary
- bonuses relating to the quality or quantity of work performed by the individual rather than general non employee specific bonus or share schemes (e.g. based on the company's performance) etc
- commission
- overtime (note: if the right to work overtime is part of the comparable employees terms then the agency worker will also have the right to work/apply to work overtime at which overtime rates will be paid)

- cash equivalent of vouchers that can be exchanged for services e.g. luncheon vouchers, child care vouchers, eye test vouchers
- holiday pay (above statutory minimum can be rolled up)

What does "pay" exclude (i.e. an agency worker has no right to receive comparable "pay"): occupational/company benefits, e.g. corporate maternity/paternity/sick pay **above** statutory minimum

- pensions
- redundancy pay
- financial participation schemes
- notice pay
- advances
- expenses incurred in the performance of the permanent workers duties
- permanent health insurance
- minimum service-linked benefits
- bonus not linked to individual performance, i.e. based upon company performance
- Other "pay" considerations:
- each "pay" element must be compared individually on its own - pay elements cannot be aggregated and compared as a package
- hirers may reference pay scales, collective agreements, national agreements and/or established custom or practice
- if the comparative employee does not get certain rights or access to facilities and/or eligibility for certain pay elements until after a lapsed period of employment then this will apply equally to the agency worker.

How do you calculate the 12 week qualification period?

After 12 calendar weeks continuous employment in the same role with the same hirer the agency worker is entitled to same "basic" working and employment conditions as a comparable permanent employee doing the same/broadly similar work

The 12 week "clock" can be paused where the agency worker has a break of 6 weeks or less away from the same role with the same hirer, and the 6 weeks is extended in circumstances due to:

- annual leave
- jury service; or
- sickness of up to 28 weeks

The 12 week clock continues to accrue if the absence is related to pregnancy and/or maternity, paternity and/or adoption leave

A new 12 week qualifying period will begin if the agency worker:

- starts a new assignment with a new hirer, or
- starts a substantially different assignment with the same hirer, and/or
- there has been a minimum of 6 weeks break between assignments

Note: there are "anti-avoidance" provisions to counter any manipulation of the 12 week clock.

As at: 01/09/2011

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Which agency workers will be caught by AWR?

All agency supplied workers are caught by AWR with the exception of the following:

- those workers employed on a 'paid between assignments' basis (commonly known as the 'Swedish derogation')
- those individuals who are supplying their services but are not "under the supervision and direction of the hirer" i.e. those workers with their own personal service company who are outside IR35, may be outside AWR on the basis that they are in business on their own account (self employed) and are therefore not under the supervision and direction of the hirer. Conversely, if a worker is caught by IR35, he/she will be caught by AWR.

What if the employed worker is on a "paid between assignments" basis (commonly known as the Swedish derogation)?

- Some umbrella companies and agencies may employ agency workers in this way
- These workers will be outside AWR in all regards relating to comparable "pay" but day one rights will still exist

Who is liable for a breach of AWR?

The hirer (Client) is liable in respect of access to vacancy information/shared on-site facilities

The temporary work agency is liable in respect to equal treatment of pay to the extent they are responsible - the hirer or another temporary work agency in the chain can be fully/partially liable to the extent that they are "responsible" for the breach e.g. information was requested from them but they either did not provide it or gave the wrong information

Note: there is an additional award of £5,000 if "anti-avoidance" provisions are breached - determined at the tribunal's discretion.

Summary

All agency workers have the right to the same pay and working conditions as a comparable permanent employee of the hirer except:

- those with their own personal service company where the assignment is outside IR35 may be outside AWR, and
- those workers employed on a "paid between assignments" basis (commonly known as the Swedish derogation) will be outside AWR for all aspects of "pay"

The Department for Business Innovation & Skills (BIS) guidance will help and is due to be published in April/May 2011

It will take a number of years for best practice to emerge via the courts.

Co-operation is essential relating to the flow of information and data between the Client and Parkside

- Should you wish to have a consultation please contact your Parkside Consultant or mike.ryall@parksiderec.com

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