

HR Recruiters' Forum
Public sector

Agency Workers Regulations

The Countdown has begun: Are you ready?

7 December 2010

Nicola Linkleter, Managing Director, Badenoch & Clark

Andy Smith, Head of Regulation & Employment, Adecco
Group UK & Ireland

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Agenda

09:30 - Introduction by **Nicola Linkleter**, Managing Director,
Badenoch & Clark Public Sector

09:45 - **Andy Smith**, Head of Regulation & Employment, Adecco UK &
Ireland – **Agency Workers Regulations**

11:00 - Questions from the floor and roundtable discussion

12:00 - Close by **Nicola Linkleter**, Managing Director,
Badenoch & Clark Public Sector, followed by coffee and networking

AWR headlines

- 2008 EU Directive on Temporary Agency Workers – 3rd 'Atypical Work Directive'
- 'Equal treatment' for agency workers after 12 weeks on assignment – agency/client liability
- Basic working and employment terms and conditions
- Unique test of equal treatment
- Coming into force 1 October 2011
- Regulations before Parliament 22 Jan 2010
- The new Government

AWR agenda

- Scope of the Regulations
- What terms and conditions are included
- How the qualifying period will work
- How equal treatment on terms and conditions will be identified
- Potential 'derogation'
- Other equal treatment issues
- Liability and enforcement
- Assessing the impact
- Possible responses

Myths and misunderstandings

- No restrictions on use
- No obligation to employ direct
- No effect on employment protection rights
- Equal treatment does not work both ways

Scope

- Employment businesses Workers included:
 - Agency workers on standard terms of engagement
 - Agency workers engaged under contracts of employment
 - Agency workers engaged by 'umbrellas'
- Workers excluded:
 - 'Profession or business undertaking' – limited company contractors?
- Intermediaries – NV / MV

'Equal treatment' terms and conditions

Terms and conditions related to:

- Working time and holiday rights:
 - Duration of working time
 - Rest periods / rest breaks
 - Entitlement to annual leave (& public hols)
- Pay

What 'Equal treatment' terms and conditions (2)

Definition of 'pay' will include:

- Basic pay
- Terms about overtime payments
- Shift / unsocial hours premiums
- Holiday pay
- Bonus / commission related to individual effort
- Vouchers with cash value (but not salary sacrifice)

Definition specifically excludes:

- Sick pay
- Maternity / paternity pay
- Redundancy / notice pay
- Pension entitlements
- Benefits in kind
- Bonuses not directly related to work done
- 'Financial participation schemes' – share of profits

Qualifying period

- 12 weeks in 'same role' through any agency
- Any work on an assignment in a week counts
- Breaks of 6 weeks or more re-set clock
- Change to job duties must be 'substantive'
- Clock 'paused' for certified sickness & seasonal shutdowns
- Clock continues during pregnancy-related absence

Anti avoidance measures

If client / agency arranges:

- Breaks of more than 6 weeks and / or;
- Changes in job 'role' and / or;
- Move between associated companies in group...

If held to be deliberate:

- Agency worker qualifies anyway
- £5,000 fine per worker

Establishing equal treatment

Regulation 5:

- ‘...an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer other than through an agency and at the time the qualifying period commenced...’
- ‘...basic working and employment terms and conditions are those that are *ordinarily included* in contracts of employment or workers’ contracts whether by collective agreement or otherwise’

Establishing equal treatment (2)

‘Ordinarily included’ meaning only terms set out in:

- Pay scales / bandings
- Collective agreement

Or:

- Established ‘custom and practice’

Establishing equal treatment (3)

BIS examples:

- Hirer has pay scales to cover permanent workforce:
 - Equal treatment = starting point of scale, if relevant
- Hirer has no pay structures but 'going rate':
 - Equal treatment = going rate
- Hirer has no pay structure and no 'comparable worker':
 - No equal treatment (on pay)
- All terms individually negotiated:
 - No equal treatment (on pay)

Establishing equal treatment (4)

Some key points:

- Pay scale etc *at the time of recruitment* is relevant, not pay of in-situ comparators
- Is a right to relevant *terms and conditions* related to pay etc
- On-going entitlement
- The proper comparison – agency v. direct hire, not temp v. perm or full time v. part time?
- 'Transitional arrangements'

Establishing equal treatment (5)

- 'Comparator' as evidence of compliance:
 - Equal treatment *deemed* to have been provided
 - But no right to equal treatment by reference to comparator

'Derogation' from equal treatment on pay

- Article 5.2, 2008 EU Directive
- Regulation 10, 2010 UK Regulations:
 - Permanent employment contract with agency
 - Entitled to min. 50% of pay or NMW if no work is available
 - Agency must pay for at least 4 'non-assigned' weeks before agency can terminate employment contract
 - Equal treatment will not cover 'pay'

Other equal treatment issues

- Equal access to 'collective facilities & amenities' (day 1):
 - Canteen 'or similar'
 - Transport
 - Crèche
- Equal access to information about permanent vacancies (day 1)
- Both by reference to the 'comparable worker'

Other issues

- Protection of pregnant workers
- Thresholds
- Information about use

Liability and enforcement

- Individual right – employment tribunal
- Agency's liability and defence:
 - Took reasonable steps to obtain information
 - Reflected information received in worker's terms
- Hirer's liability
- Penalties
- Information requests

Assessing the impact

What would be the impact if no action taken:

- Do you hire directly to fill relevant posts'?
- Are there terms that are 'ordinarily included'?
- If so, is there a pay / holiday gap?
- Bonus schemes?
- Length of assignments?
- 'Collective facilities'?

Action?

Potential means to mitigate

Client led:

- Adjust starting rates for direct hires
- Bespoke qualifying periods – pay / holidays
- Manage assignment duration
- Ring-fence agency workers?
- In-house 'temps'?
- 'Managed service'?

Agency led:

- Pay between assignments derogation

When might the 'derogation' work?

- Significant pay 'gap'
- Long-term assignments
- Stable workforce
- Advantages:
 - For worker: employment protection, guaranteed income
 - For agency: means to retain skills and experience
 - For client: mitigates cost, 'hands-off' solution
- Disadvantages(?):
 - Administration challenge – agency

Some practical aspects of compliance

- Costs?
- Exchange of information - on-going obligation
- Qualification through multiple agencies
- PSL
- Quality of relationships will be key

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My contact details

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Thank you for attending
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