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Innovation & Skills

**AGENCY WORKERS REGULATIONS  
GUIDANCE**

APRIL 2011

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# Introduction

At a glance

This section covers:

- How to use this guidance
- When the law changes
- How to leave feedback

## How to use this guidance

This aim of this guidance is to help both employers and the recruitment sector to understand and implement these Regulations effectively.

Each section covers the key provisions of the Regulations and, where possible, is accompanied by useful links and related flowcharts and desktop downloads.

## When the law changes

The legislation will come into force on 1 October 2011, giving agency workers the entitlement to the same or no less favourable treatment with respect to basic employment and working conditions, if and when they complete a qualifying period of 12 weeks in a particular job.

It is not retrospective and for those agency workers already on assignment, the 12 week qualifying period will start from next October. Agency workers will also be entitled to access to facilities and information on job vacancies from Day 1 of their assignment.

## Feedback

If you wish to comment on the content of this guidance, please write to;

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# Scope

## At a glance

### The Agency Workers Regulations apply to:

- individuals who work as temporary agency workers;
- individuals or companies (private, public and third sector) involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer;
- and hirers (private, public and third sector)

This section considers who is covered by the regulations and those who are likely to be outside the regulations together with illustrative examples.

### Covered in this section;

Definition of who is covered by the regulations

- **Temporary Work Agency (TWA)**
- **Agency worker**
- **Hirer**

Those who are likely to be outside the scope of the regulations include;

- individuals who find work through a temporary work agency but are in business on their own account
- individuals working on Managed Service Contracts where the worker does not work under the direction and supervision of the host organisation
- individuals working for in-house temporary staffing banks where a company employs its temporary workers directly (and they only work for that same business or service)
- individuals who find direct employment with an employer through an “employment agency”
- individuals on secondment or loan from one organisation to another

These Regulations affect Great Britain. Northern Ireland is publishing separate Regulations in line with their national law.

If there is a dispute about whether someone is within the scope of the regulations, the courts will consider if the description of the arrangements reflects the reality of the relationship.

## In scope

### The Temporary Work Agency (TWA)

A **temporary work agency (TWA)** supplies **agency workers** to work temporarily for a third party (the **hirer**). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract (an employment contract or an agreement to provide services personally) with the TWA. Under the Regulations a TWA is a person in business, whether for profit or not and including both public and private sector bodies, involved in the supply of temporary agency workers. This could be a “high street” agency, but also an **intermediary**, such as an **umbrella company** or a **master or neutral vendor** if they are involved in the supply of the agency worker.

An individual is not prevented from being an agency worker under the Regulations simply because they work through an intermediary body. For example, an individual working through an umbrella company, who finds work via a TWA, is covered by the Regulations. The individual will usually have an overarching employment contract with the umbrella company with full employment rights and all of the employee’s income being treated as employment income.

Sometimes the supply of agency workers is managed on behalf of a hirer by a master vendor or neutral vendor that may or may not engage and supply workers directly or indirectly. These arrangements exist where a hirer appoints one agency (the master vendor) to manage its recruitment process, using other recruitment agencies as necessary (“second tier” suppliers) or appoints a management company (neutral vendor) which normally does not supply any workers directly but manages the overall recruitment process and supplies temporary agency workers through others.

Master or neutral vendors fall within the legal definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals.

**It is important that the correct information from the hirer is shared between the master and neutral vendors and other parties in the chain of supply of the individual agency worker in order to ensure that whoever actually pays the agency worker is aware of their entitlement to similar terms and conditions as someone directly recruited after 12 weeks in a given role. See section on information flows for more detail.**

The regulations do not cover employment agencies who introduce workers to employers for direct or permanent employment. Once a worker is placed with a permanent employer they have no further contractual relationship with the agency.

Some recruitment agencies offer both temporary and permanent vacancies. A work-seeker’s relationship with the recruiter depends on what type of work that they want to do. These Regulations only apply when supplying temporary agency workers to hirers (i.e. where they are acting as TWA’s). TWA’s should ensure that they make clear the way in which they are acting on behalf of the individual worker, as required in the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#).

## The Agency Worker

An agency worker (often referred to as a ‘temp’) is someone who has a contract with the TWA (an employment contract or an agreement to provide services personally) but **works temporarily for and under the direction and supervision of a hirer**. The unique, **tripartite relationship** between agency worker, agency and hirer is a key feature of these Regulations and who is covered by them.

The key elements required for someone to be an agency worker are:

- there is a contract (an employment contract or an agreement to provide services personally) between the worker and a TWA;
- that worker is temporarily supplied to a hirer by the TWA; and
- when working on assignment the worker is subject to the supervision and direction of that hirer.

AND

- the individual in question is not in a business on their own account.

## Illustrative examples

### Example characteristics of an agency worker (AW)

- ✓ The AW works for a variety of hirers on different assignments but is paid by the TWA who deducts tax and NICs (National Insurance contributions)
- ✓ The AW works for a variety of hirers on different assignments but is paid by the TWA who deducts tax and NICs (National Insurance contributions)
- ✓ The AW has a contract with the TWA but works under the direction and supervision of a manager within the hirer
- ✓ Time sheets are given to the TWA who pays the AW for the hours worked
- ✓ If an AW is on sick leave, the TWA pays the Statutory Sick Pay (subject to satisfying the criteria applicable to all workers)
- ✓ The TWA pays holiday pay when paid statutory annual leave is taken

### Example characteristics of a person who uses TWA to find permanent work but is not covered by the Directive

- ✓ The agency introduces an individual to a hirer for a directly employed role, paid by the hirer
- ✓ The contract is agreed between the worker and hirer and is open ended or may be for a fixed period

## The hirer

The hirer (end-user) is a private, limited company (partnership or sole trader) or public sector body that books agency workers via a temporary work agency. A hirer will be registered as a business and have its own legal identity (see section on liabilities).

## Out of scope

The definition of an agency worker excludes those who are in *business on their own account* where the hirer is a client or customer of the individual (i.e. a genuine business to business relationship).

**Simply putting earnings through a limited company would not in itself put individuals beyond the possible scope of the Regulations.** Individuals may choose to do this for the sake of flexibility or for tax reasons. However, where the relationship between the individual, TWA and hirer remains, in essence, a tripartite relationship, and a hirer is not a client or customer of such individuals, they are likely to be in scope.

In the event of a dispute, in order to establish if a worker is genuinely self-employed, the courts have devised a number of tests which examine the individual's circumstances and consider all aspects of the relationship, including what a contract might say or what it does not say, the expectations of the parties and their conduct, to establish the reality of the relationship.

If the arrangements do not reflect the reality of the relationship (e.g. despite the wording of a contract, the actual reality is that the individual is in not in business on their own account and they work under the supervision and direction of the hirer) or are an avoidance tactic, then individuals are likely to fall into scope of the regulations.

For further information about employment status refer to;

[Business Link – Employment status](#)

**Ultimately, in the event of a dispute, it will be for the Courts to decide the reality of the relationships between the parties involved and will look closely at types of roles that are not commonly associated with high numbers of self-employment such as low-skilled work.**

### **Managed Service Contracts are out of scope**

Where a company provides a specific service to a hirer – such as catering or cleaning this is usually known as a Managed Service Contract which is based on a contract for services that will usually set out certain service level agreements. The managed service contractor, not the hirer, has responsibility for managing and delivering the catering or cleaning service rather than just supplying the staff.

The Managed Service Contractor must be genuinely engaged in supervising and directing its workers on site on a day to day basis and must determine how and when the work is done. If it is the hirer that determines how the work is done, then it is more likely that the agency workers will be covered by the Regulations.

Merely having an on-site presence (e.g. a named supervisor from an agency) is not considered a Managed Service Contract.

However, where a Managed Service Contractor requests agency workers via an agency to work under their supervision and direction as a hirer, they will be in scope.

### **In-house temporary staffing banks are out of scope**

In-house temporary staffing banks are used as a source of internal flexibility and they are not covered by the regulations. This is where a hirer employs their temporary workers directly and they are only supplied to work for that same business or service. In this case, they would not be acting as a TWA and would therefore not be in scope.

In practice, whether or not a particular arrangement falls in scope will depend on the reality of the employment and organisational arrangements.

For example, where one legal entity employs temporary workers and places them into another legal entity (so an individual's contract is with one company but they work for another), including other associated or group companies, then they are likely to be acting as a TWA and will be in scope.

### **Illustrative examples**

#### **Example characteristics that demonstrate you are in scope**

✓ A company has a staff canteen managed by an in-house catering manager. One of the company's catering staff is absent for three weeks and is replaced by a worker supplied by a temporary work agency. During her assignment the worker is supervised and controlled by the hirer's catering manager. She fits the definition of an agency worker and is in scope.

#### **Example characteristics that demonstrate you are not in scope**

✓ Another organisation contracts out the management of its canteen. The contractor manages the entire operation of the canteen and is responsible for the direction and control of its own catering staff. Although they are working on the hirer's premises, the contractor's workers are not agency workers because they are not subject to direction and control by the host/hirer organisation.

✓ An individual is directly employed by a government department but is on secondment to a private sector organisation until they return to the original post when the secondment ends. The government department is not acting as a TWA

✓ An individual works for an internal project team and is paid directly by his employer, covering a variety of temporary posts dependent on where he is needed. This will be out of scope.

## In summary

<b>In scope</b>	<b>Out of scope</b>
<b>TWAs</b> – including intermediaries – involved in supply of agency worker	Genuinely <b>in business on own account</b> working for clients or customers
<b>Hirer</b> (end-user)	<b>In-house temporary staffing banks, secondments</b>
<b>Agency worker</b> (in tripartite relationship including those working through umbrella companies or other intermediaries)	<b>Managed Service Contract</b> staff

# Qualifying for equal treatment

## At a glance

This section covers what equal treatment means under these Regulations and the new entitlements that agency workers will receive from the **first day** of an assignment and additional pay and basic working entitlements following a **12 week qualifying period**. They are;

- **new entitlements** for agency workers under the regulations
- how to **calculate the 12 week qualifying period**
- **break between assignments** that means clock starts again on the qualifying period (or when clock pauses)
- when is a role a **substantively different** job and clock starts again
- implications for equal treatment **where agency workers who have contract of employment** and receive pay between assignments
- other entitlements under equal treatment provisions - **working time provisions such as rest and holiday entitlements**
- treatment of **pregnant workers and new mothers**
- **day 1 access to facilities** at the hirer's premises
- **day 1 access to information on job vacancies** at the hirer's premises

## Existing entitlements and protections

Don't forget that agency workers are already entitled to a range of statutory protections; [www.direct.gov.uk/en/Employment](http://www.direct.gov.uk/en/Employment).

## New entitlements

### Day 1 rights for all agency workers

The regulations provide new entitlements giving agency workers the same access to certain facilities provided by the hirer and information on job vacancies as comparable permanent workers and employees from the first day of their assignment.

- **access to facilities**; such as the staff canteen, transport facilities, car parking and child-care facilities
- **access to vacancies**; the right to be notified of any job vacancies within the hirer

This is not a right to special treatment, for example, if a crèche is full and any permanent recruit has to go on a waiting list, this will also apply to the agency worker. Similarly, this could happen with car park spaces (refer to Day 1 entitlements).

### After 12 weeks in the same job

These additional new equal treatment entitlements relate to 'relevant terms and conditions', namely pay and other basic working conditions and will only come

into effect after an agency worker completes a 12 week qualifying period with the same hirer, in the same role (refer to information required). They are;

- **pay** related to work undertaken on assignment
- **duration of working time**
- **night work**
- **rest periods**
- **rest breaks**
- **annual leave**
- **paid time off for ante natal appointments**

### **Calculating the 12 week qualifying period**

The 12 week qualifying period is **triggered by working in the same job with the same hirer for 12 calendar weeks**. A calendar week in this context will comprise any period of seven days starting with the first day of an assignment. Calendar weeks will be accrued regardless of how many hours the worker does on a weekly basis.

Therefore, even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after 12 calendar weeks calculated in this way.

For example, an agency worker begins work on a Tuesday so all work done up to and including the following Monday will count as one calendar week. A new qualifying period will only begin if a new assignment with the same hirer is substantively different and/or there has been a minimum of six weeks break between assignments.

It is **not retrospective**; an agency worker will only be able to accrue the 12 weeks qualifying period after the regulations come into force on 1 October 2011 even if the assignment started before 1 October 2011.

An agency worker can qualify for equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one agency for part of that period of time.

In order to ensure that the agency worker receives their correct entitlement, the TWA will normally want to ask the agency worker for their up to date work history, the aim being to ensure that they have the correct information with regards to that worker accumulating the 12 week qualifying period in the same job with the same hirer. This is already common practice for TWA's, who would of course be well-advised to ask for this information, since not to do so could leave that agency in a position where it may become liable, in whole or part, for any lack of equal treatment arising as a result.

While there is no legal obligation on the agency worker to provide information on previous assignments, if an agency worker fails to inform the agency when asked that they have worked for a hirer in the last 6 weeks and then brings a claim for equal treatment, the tribunal may take this into account in making any award. **Hirers and TWA's should be aware of anti-avoidance provisions, which address any situations that are designed to deliberately deprive an agency worker of their entitlements.**

## Working for multiple hirers

An agency worker might work for more than one hirer during a week (or even during a day) resulting in more than one qualifying period running at any one time.

### Illustrative examples

#### Working through multiple agencies

An agency worker works for a hirer for 6 weeks with one agency and is placed in the same hirer three weeks later by another agency for a further 8 weeks.

As there has not been a 6 week break between the assignments, the agency worker will be entitled to equal treatment after 6 weeks on the second assignment.

#### Working for multiple hirers

An agency worker has an assignment to drive an HGV1 lorry one day a week for 4 different hirers.

The agency worker will qualify for equal treatment in each of the hirers after 12 weeks.

### Break between assignments – when the qualifying period clock pauses and when it restarts

If the break between assignments with the same hirer is less than 6 weeks and the role is not substantively different, generally the clock will pause and start ticking again when the agency worker resumes work with the hirer (unless the clock on the qualifying period has paused due to pregnancy, etc, see summary table below).

#### Typical reasons for the qualifying clock to re-start;

- most commonly it will be because an **agency worker begins a new assignment with a new hirer**
- where an agency worker remains with the same hirer but is moved to a **substantively different job role**, which might be immediately after the first role or before the 6 weeks break has elapsed
- if there is a **break of 6 weeks or more** between assignments with the same hirer, then the qualifying clock will re-start (there are a limited number of exceptions – see summary table below)

## Types of absence that will cause the qualifying clock to ‘pause’;

- **any break of less than 6 weeks between assignments** or during an assignment, where the agency workers returns to the same hirer in the same role will not mean the ‘clock’ on the 12 week qualifying period re-starts. It will “pause” and restart when the agency worker returns to the role
- **where the absence is related to pregnancy or sickness or beyond the control of the agency worker such as workplace closure**, the clock on the qualifying period will “pause” or “continue to tick” depending on the type of absence. See summary table below.

### Illustrative examples

#### Workplace closure

Where an agency worker works in a factory and has an assignment which starts for 2 weeks before it closes during the summer period and continues when it re-opens after the summer (or 2 separate assignments before and after the summer holidays). As the factory effectively closes, the qualifying ‘clock’ will pause and continue running from where it left off when it re-opens. This will also be the case where a hirer closes due to industrial action.

### Different types of consecutive absences

An agency worker has a break of 5 weeks between assignments, then is absent for 2 weeks due to sickness. Sickness absence ‘pauses’ the clock, therefore the qualifying period will continue to ‘tick’ if they return to the same role. In these circumstances, the break is longer than 6 weeks but continuity is not broken as different types of absence may run consecutively.

### In summary

Type of absence that affects the 12 week qualifying period	Effect on 12 week qualifying period
Any reason where the break is less than 6 weeks	Pauses the clock
Sickness absence	Pauses the clock for up to 28 weeks
Annual leave	Pauses the clock
Shut downs – e.g. factory closure, school holidays	Pauses the clock
Jury service	Pauses the clock for up to 28 weeks
Industrial action	Pauses the clock
Pregnancy and maternity-related absence	Clock keeps ticking *
Statutory maternity, paternity or adoption leave	Clock keeps ticking **

\* The protected period for a pregnant agency worker begins at the start of the pregnancy and ends 26 weeks after childbirth (or earlier if she returns to work)

\*\*Where an agency worker has a contract of employment with an agency and is entitled to this type of leave

## Definition of 'new' hirer

Generally this will be clear. Where a hirer has multiple sites, merely moving from one site to another will not break continuity.

Where a hirer is part of a larger group and each company has its own legal identity, then the qualifying period will restart when an agency worker moves between the different legal entities.

Hirers and TWA's should be aware of anti-avoidance provisions which address any situations that are designed to deliberately deprive an agency worker of their entitlements, such as simply moving an agency worker back and forth across a group where there is common ownership via holding companies and subsidiaries.

## Illustrative examples

An agency worker acting as a Supply Teacher moves from one assignment to a separate assignment with another school in the same Local Authority (LA). The LA is the hirer so the qualifying period continues.

If the Supply Teacher moves to a different LA (or to an independent school, Academy or Free School which is a separate legal entity), the qualifying period will start again.

A warehouse has agency workers to work on a production line and to pack their products for distribution. Simply moving from the production line to a packing role requires little training and uses the majority of the same skills and is therefore not substantively different.

A move between these types of roles would not re-start the qualifying clock without a break between assignments of more than 6 weeks.

## Substantively different

If there is a substantive change to a job role within the same hirer it means the 12 week qualifying period can start again. Refer to anti-avoidance provisions regarding the need to avoid situations where transfers between roles are manufactured in order to avoid the regulations.

**The whole or main part of a role must be substantively different**; it is not enough to simply change a line manager but not the job requirements or to transfer the agency worker between similar administrative functions or move them within a single, relatively small business unit or just give a different pay rate. There has to be a genuine and real difference to the role.

## **The factors that may make a role substantively different**

The key factors that will determine whether a job is substantively different relate to changes in the skill set required to carry out a job and in the nature of the work and duties carried out.

In the event of a dispute, a combination of factors can be expected to be taken into account by a tribunal when establishing whether or not a role is substantively different, such as different skills and attributes, a new level of responsibility, a different Line Manager, a change of organisational unit or location, a change in working hours and pay rate. Primarily, you will need to consider if the content of the job duties has changed.

### **A combination of the following characteristics can help to establish if a job role is substantively different;**

- ✓ Are different skills and competences used?
- ✓ Is the pay rate different?
- ✓ Is the work in a different location/cost centre?
- ✓ Is the line manager different?
- ✓ Are the working hours different?
- ✓ The role requires extra training - and/or a specific qualification that wasn't needed before?
- ✓ Is different equipment involved?

## **Actions when a role is substantively different**

In order to trigger the 12 week qualifying clock to start again on this ground, you must comply with certain information flow requirements. It can only count as a "substantively different role" when and if the hirer notifies the agency that the job duties have changed and this information is passed to the agency worker.

- a hirer must notify an agency in writing when there a new role that is substantively different (see [Conduct Regulations](#) for more details) and provide details on the job requirements.
- the agency must record details about the new vacancy and must provide a description of the new role in writing to the agency worker. The agency should notify the agency worker that their role has substantively changed and that the qualifying period will start again.

## **12 week assignments and anti-avoidance provisions**

A hirer can obviously decide not to engage agency workers beyond the 12 week qualifying period and there is nothing in the regulations to prevent an agency worker being released after 11 weeks or for assignments of 11 weeks to be the usual practice of any hirer. However, hirers and TWA's should be aware of anti-avoidance provisions which address any situation where a pattern of assignments emerge that are designed to deliberately deprive an agency worker of their entitlements.

For example, an agency worker completes 2 or more assignments with the same hirer, where they have already worked for 11 weeks with a 6 week break and then a further 11 weeks with another 6 week break. If the agency worker is then taken on for a third assignment, this could be considered an attempt to avoid equal treatment but it would need to be clear that there was a deliberate and regular pattern designed to avoid the Regulations.

### **Access to facilities**

**From day one of an assignment**, all agency workers are entitled to equal access to collective facilities and amenities as provided by the hirer to direct employees.

This is not intended to extend to a right to access everything a hirer might provide to direct employees; instead it applies to those facilities provided by the hirer and which help staff to meet the demands of working at a particular location, such as:

- a canteen or other similar facilities
- crèche
- transport services (e.g. in this context, local pick up and drop offs, transport between sites – it does not mean company car allowances, season ticket loans)
- toilets/shower facilities
- staff common room
- waiting room
- mother and baby room
- prayer room
- food and drinks machines
- car parking

This is a non-exhaustive list and acts as an indication of which kind of facilities should be included. It applies to facilities provided by the hirer and therefore these facilities will usually be on-site. However, for example, if a canteen is used on another site – or shared with another company – then this should also be available to agency workers.

### **Access to facilities is not:**

This does not mean that agency workers will be given ‘enhanced’ access rights, for example, where membership to a crèche involves joining a waiting list, the agency workers would also be able to join the list and would not be given an automatic right to have a crèche place.

This is not about access to off-site facilities or benefits in kind which are not provided by the hirer, such as subsidised access to an off-site gym as part of benefit package to reward long term service and loyalty, or access to discounted company goods in a staff shop. However, this does not prevent hirers offering this to agency workers if they choose to do so.

Less favourable access to any of the facilities listed above is the only situation where an **objective justification** argument may be used. Essentially, hirers would have to ask themselves “is there a good reason for treating the agency

worker less favourably?" Cost may be one factor to take into account but hirers are unlikely to be able to rely on cost alone to justify different treatment. Practical and organisational considerations could also be a factor. Objective justification may be a matter of degree. Hirers should consider whether it is possible or feasible to offer agency workers certain access to facilities on a pro rata basis, as an alternative to excluding them altogether.

**A checklist might consist of the following questions:**

- is there is a good reason for treating a particular agency worker (or group of agency workers) less favourably, giving due regard to the needs and rights of individual workers and trying to balance those against business objectives?
- as indicated previously, objective justification may be a matter of degree and in order to objectively justify less favourable treatment can the hirer show that the treatment in question:

Is to achieve a legitimate aim?

Is necessary to achieve that aim? And:

Is an appropriate way to achieve that aim?

**Access to facilities – comparable worker**

Under the Regulations, an agency worker's right is to treatment in relation to relevant facilities that is no less favourable than that given to an actual comparable worker – an employee or worker directly-employed by the hirer.

First, the hirer should establish if there are any comparable employees or workers. Information about access to facilities is likely to be set out in company handbooks or a matter of custom and practice. To be comparable they should be;

- doing the same or broadly similar work to the agency worker
- working alongside the agency worker or be in another location owned by the hirer (this is to avoid any confusion when a company has several different buildings and may have, for example, a canteen in one particular building to which all direct employees in all the buildings have access).

The hirer is responsible for providing equal treatment for day 1 entitlements and is liable for any breach of this entitlement, as the agency has no control over providing an agency worker with access to facilities in the hirer when they are on an assignment.

The hirer could either provide agency workers with information about their facilities, for example as part of an induction pack, or provide information to agencies to pass to agency workers as part of the information about the assignment.

## Access to information on job vacancies

**From day one of an assignment**, all agency workers will have the right to be provided with information about any job vacancies within the hirer that would be available to a comparable employee or worker.

Hirers can choose how to publicise vacancies, whether it's via the internet/intranet or on a notice board in a communal area.

### Access to vacancies is not:

This obligation does not constrain employers' freedom regarding;

- any qualification or experience requirements such as time in service with the organisation
- how they treat applications

This right will not apply in the context of a genuine 'headcount freeze' where posts are ring fenced for redeployment purposes. It only applies to actual vacancies and any internal moves in this case are a matter of restructuring and redeploying existing internal staff, in order to prevent a redundancy situation.

### Access to vacancies comparator

The need to inform agency workers of vacancies is limited to where there is a comparable employee or worker currently based at the same establishment. Practical difficulties would arise from including those which may be geographically remote or on the basis of comparison with a predecessor. In summary

<b>Comparator for Day 1 rights</b>	<b>access to facilities</b>	<b>access to vacancies</b>
Employee or worker	Yes	Yes
Working for and under the supervision and direction of the hirer	Yes	Yes
Engaged in same or broadly similar work	Yes	Yes
Based at same establishment	Yes	Yes
Based at different establishment	Yes	No
Must still be employed/engaged	Yes	Yes

# Pay

## At a glance

The definition of pay for the purposes of these Regulations is defined as basic pay plus other contractual entitlements that are directly linked to the work done by the agency worker whilst on assignment, i.e. **‘pay for work done’**.

This guide explains what is included and excluded when establishing equal treatment on ‘pay’.

### ‘Pay’ includes

- basic pay based on the annual salary an agency worker would have received if recruited directly (usually converted into hourly or daily rate, taking into account any pay increments)
- overtime payments, subject to requirements regarding the number of qualifying hours
- shift/unsocial hours allowances, risk payments for hazardous duties
- payment for annual leave (above the statutory minimum of 5.6 weeks, at a full time equivalent rate) which can be added to the hourly or daily rate
- bonuses or commission payments directly attributable to the amount or quality of the work done by the individual, including where sales or production targets achieved and payments related to quality of personal performance (see sections below on bonuses linked to personal performance and performance appraisal systems)
- additional discretionary, non-contractual payments that are paid with such regularity that they have become custom and practice but which do not fit the excluded types of bonus described below
- vouchers or stamps which have monetary value and are not “salary sacrifice schemes” – e.g. luncheon vouchers, child care vouchers

### ‘Pay’ excludes

- occupational sick pay (the regulations do not affect an agency worker’s statutory entitlement to statutory sick pay)
- occupational pensions (agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012)
- occupational maternity, paternity or adoption pay (the regulations do not affect an agency worker’s statutory entitlements)
- redundancy pay (statutory and contractual)
- notice pay (statutory and contractual)

- payment for time off for Trade Union duties
- guarantee payments as they apply to directly recruited staff if laid off
- advances in pay or loans e.g. for season tickets
- expenses such as accommodation and travel expenses
- payments or rewards linked to financial participation schemes such as share ownership schemes, phantom share schemes
- overtime or similar payments where the agency worker has not fulfilled qualifying conditions required of a direct employee. So, for example, an agency worker would have to be doing work over and above standard hours to qualify for overtime, not just do a shift that permanent staff tend to do on an overtime basis
- the majority of benefits in kind, given as an incentive or reward for long-service, for example, where Building Society staff may be given a reduced rate mortgage , employer funded training allowances
- any payments that require an eligibility period of employment/service, if not met by the agency worker (same treatment as someone directly employed) or if the agency worker is no longer on assignment when the bonus is paid (if the same applies to directly recruited employees)
- bonuses which are not directly linked to the contribution of the individual – e.g. a flat rate bonus that is given to all directly recruited workers to encourage loyalty or long term service
- additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice e.g. a one-off payment to celebrate a particular event

### **Bonuses linked to individual performance**

There are many different types of bonus or commission payments. The key question when deciding whether an agency worker qualifying for equal treatment is entitled to any such payment is whether it is directly attributable to the work which that worker has done.

### **Examples of bonus payments that would be included;**

- commission payments linked to sales;
- bonuses payable to all staff who meet a specific individual performance target, e.g. in terms of calls handled in a given time;
- bonuses payable to all staff who demonstrate through their work that they consistently respect company standards or values;

- bonuses payable on the basis of individual performance over a given period, e.g. a reporting year
- bonuses containing individual and corporate elements, where the hirer will need to identify what percentage is linked to personal performance and pay accordingly.

### **Examples of bonus payments which would be excluded;**

- bonuses reflecting the overall performance of the company;
- bonuses reflecting the overall performance of the part of the organisation where the agency worker has worked with little or no recognition of individual contribution
- bonuses designed to reward longer term loyalty and service to the organisation

In all cases an agency worker will not have to receive exactly the same bonus as any particular directly-recruited worker but the bonus should be paid according to the same criteria, providing them with the same opportunity to achieve a bonus subject to their personal performance.

Where a bonus payment to a directly-recruited employee would reflect performance over a period that exceeds an agency worker's assignment, the agency worker would be entitled to the payment that a directly recruited employee doing the same job for the same period would have received it. So if an employee present for only six months of a reporting year would have received 50% of a bonus that would also be the case for an agency workers present for those six months.

### **Performance appraisal systems**

The effect of the Regulations is not to require full integration of agency workers into performance appraisal systems for direct employees.

The agency worker is entitled to the bonus that he or she would have been entitled to if hired direct to do the same job, but this does not mean that the same process for assessing performance need be followed.

In some workplaces, annual appraisals also cover career development as well as the assessment of bonuses and it may be appropriate for the hirer to modify the assessment process and to conduct shorter appraisals for agency workers. Should a hirer choose to address this requirement of the regulations by integrating an agency worker into an existing performance appraisal system, **this need not affect the worker's employment status.**

Where an agency worker qualifies for equal treatment in respect of a bonus that would normally be calculated on the basis of a performance appraisal system, alternative approaches could include:

- creating a simpler system to appraise agency workers - agency workers will normally have clear objectives to help them undertake the

assignment which could form the basis of their appraisal and this could be aligned to that used by the hirer

- utilising an agency's existing appraisal/feedback system to keep track of their performance through regular discussion between the hirer and agency
- paying the agency worker the appropriate performance bonus - for example, the award based on a satisfactory performance. Where no formal appraisal has taken place, whoever supervises and directs the agency worker could be asked if they should receive any additional payment if their performance was "exceptional" or "well above normal requirements" and would have resulted in an additional payment if they had been recruited directly.

### **Illustrative examples**

#### **Where an individual performance bonus is in scope of pay**

A line manager is carrying out an annual individual assessment for a member of their team, using 4 criteria derived from their employee company values.

- 1) Competence in performing role
- 2) Working relationships with internal and external stakeholders
- 3) Business achievement in terms of contribution to achieving company/unit targets
- 4) Attendance record

The bonus levels differ depending on performance – not met values (no payment); achieved values (£1,000 bonus); exceeded values (£2,000 bonus).

The hirer will need to share the standard of the agency workers performance with the agency.

If the award of the bonus requires a period of qualifying service then the agency worker would also be subject to that period of service.

#### **Bonus following an eligibility period**

There is an eligibility period of service for all employees of 12 months before receiving a bonus. The agency worker will be entitled to the same treatment after 12 months.

This would be retrospective to a certain degree as the 12 months eligibility period is counted from the start of the assignment; so the agency worker does not have to work 15 months before they receive an entitlement a directly recruited employee would have received after 12 months.

### **The hybrid**

Hybrid scheme based initially on company performance, performance of specific business unit to create a “pot”, and then awarded depending on individual performance (levels vary according to performance marking). This kind of scheme is likely to be within the scope of “pay” under the Regulations, as it is awarded to directly recruited staff on basis of performance so linked to the amount or quality of work done by a worker.

It may be possible to identify part of award linked solely to company performance – which should be out of scope – and the part of the award linked to personal performance. The hirer will need to identify what percentage is linked to individual performance and pay accordingly.

### **Annual pay award**

Where a hirer gives an annual pay increment, an agency worker should receive the pay increment that he or she would have been entitled to if recruited directly to do the same job.

## In summary

<b>What is included in “pay”</b>	<b>What this means</b>	<b>Does not mean</b>
<b>Basic Pay</b>	‘Pay for work done’; annual salary usually converted in hourly/daily rate.  NB to this may be added some or all of the other contractual elements below	Occupational pension contributions, redundancy/severance, expenses
<b>Overtime pay</b>	Extra pay for additional overtime hours as if recruited directly	An automatic entitlement for extra pay as an agency worker will still need to qualify for overtime as if recruited directly (where such criteria apply to the latter)
<b>Bonus or incentive payment linked to personal performance</b>	‘Pay for work done’ and directly attributable to the individual	Bonuses based solely on company performance, discretionary bonuses
<b>Holiday pay</b>	Above the statutory minimum, can be given as leave or paid in lieu as part of the hourly/daily rate	Other contractual and statutory paid leave, (e.g. compassionate leave, paid time off for union duties or jury service) NB unless employed by the TWA, who would be responsible for any such provision due
<b>Vouchers or stamps</b>	Of fixed monetary value so another form of “pay”, such as luncheon vouchers	Other benefits in kind, Financial Participation Schemes, Phantom Share Schemes
<b>Paid time off for antenatal appointments</b>	After the 12 week qualifying period, paid at full hourly rate for the time it takes to attend the appointment	Occupational maternity, paternity, adoption pay NB unless employed by the TWA, who would be responsible for any such provision due

# Working time and holiday entitlements

## At a glance

This section covers what is included in working time and holiday entitlements. In addition to existing rights ([Working Time Regulations 1998](#)), after 12 weeks in a given job, an agency worker will be entitled to the same terms and conditions relating to the duration of working time, night work, rest periods and rest breaks, annual leave and to be paid at the appropriate overtime rate as he or she would have received as a direct employee.

## Working time entitlements

Many hirers may already offer some or all of these entitlements to agency workers from day one of an assignment.

For example, where a directly recruited employee would have had a more generous entitlement to rest than the statutory minimum requirement (perhaps a lunch hour rather than the minimum 20-minute rest during a shift of more than six hours), an agency worker will also be entitled to this once the 12-week qualifying period has elapsed.

## Calculating various holiday pay entitlements

In relation to paid holiday leave, all workers have a statutory entitlement to 5.6 weeks per year (based on their working pattern – somebody working five days a week is entitled to  $5.6 \times 5 = 28$  days) which can include bank and public holidays.

As with rest breaks, if a hirer would have given a more generous contractual leave entitlement to the agency worker if recruited directly to fill the same job, the agency worker concerned should receive the same enhanced entitlement once the 12-week qualifying period has elapsed.

## Payment in lieu option

There will be many differing entitlements to paid holiday leave provided by hirers and a possible way of simplifying the administration of this situation could be to deal with any additional entitlement – over and above the statutory entitlement – as a one off payment at the end of the assignment or as part of the hourly/daily rate. Such arrangements would only relate to additional, contractual leave which is in excess of the statutory minimum.

It is important to remember that payment of the statutory entitlement to annual leave should be made when the leave is taken to ensure that individuals do take the leave to which they are entitled. There will be no change to the existing law in this respect.

# Pregnant workers and new mothers

## At a glance

After completing a 12 week qualifying period in a given job, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment.

They will also need to be found alternative sources of work, paid at the same rate or higher than the original assignment, if they can no longer complete the duties of the original assignment for health and safety reasons.

If alternative work cannot be found, then the pregnant woman will have the right to be paid by the agency for the remaining expected duration of the original assignment.

This provision does not give the agency worker any additional entitlement to maternity, paternity or adoption rights beyond those to which they are already entitled nor is it a right to return to work after maternity leave.

The intention of these new entitlements is to protect agency workers who are pregnant or who are new mothers, with the aim of keeping them in the workplace and to ensure women are not treated unfairly because of their pregnancy, in addition to existing discrimination protections in the Equality Act. This guidance applies to pregnant women, women who have given birth in the last 6 months or women who are breastfeeding.

## For further information;

[Direct.gov – working when pregnant](#)

[Business Link – pregnancy at work](#)

[Health and Safety Executive - Health and safety for new and expectant mothers](#)

## Responsibility of the pregnant agency worker

The agency worker will need to first notify the agency of her pregnancy and also in writing to the hirer. The agency may wish approach the hirer on her behalf and to ask for a health and safety risk assessment in the current assignment.

If the hirer identifies a risk, they will need to make an adjustment if it is reasonable. If it is not reasonable, the agency should offer alternative suitable work if available, where the agency worker be paid at the same rate until the end of the assignment. The agency worker will not be eligible to be paid if they have unreasonably refused suitable alternative work.

The agency worker should inform the agency of any ante-natal appointment so that they will continue to be paid at the usual hourly rate.

## **Responsibility of the TWA**

If the nature of the assignment is such that a risk to health and safety is likely, the agency will need to ask the hirer to perform a workplace risk assessment and make a reasonable adjustment if necessary.

If this is not possible, the agency will need to seek alternative suitable work with another hirer, paid at least at the same rate and ensure that the agency worker is paid for any period of the assignment when she could not work due to a health and safety risk.

## **Responsibility of the hirer**

When a risk assessment is required, it is the hirer's responsibility to carry one out and where a risk is identified, the hirer is obliged to make adjustments to remove the risk.

If an adjustment is not possible or reasonable and would not remove the risk, the hirer should inform the agency who will offer suitable alternative work if available.

### **'Suitable' alternative work**

The agency worker will need to be offered suitable alternative work, paid at a rate that is no less favourable than the last assignment and in line with the type of work that they have agreed to undertake with the agency.

The clock will continue to tick and the pregnant agency worker will continue to accrue weeks in relation to both the original hirer and the new hirer where she is working in another role.

### **If the agency doesn't have a suitable equal role available**

In a case where an agency worker's assignment is ended on maternity related health and safety grounds, if the agency is not able to find a suitable alternative assignment, the agency will be required to pay the agency worker at the same rate for the duration of the terminated assignment. If the end date of the assignment is not known, the agency will be required to pay the agency worker for what would have been the likely duration of the terminated assignment.

### **Ante-natal appointments**

After a 12 week qualifying period in a particular job, an agency will be required to pay an agency worker for time that she has to take off from an assignment in order to attend her ante-natal appointment.

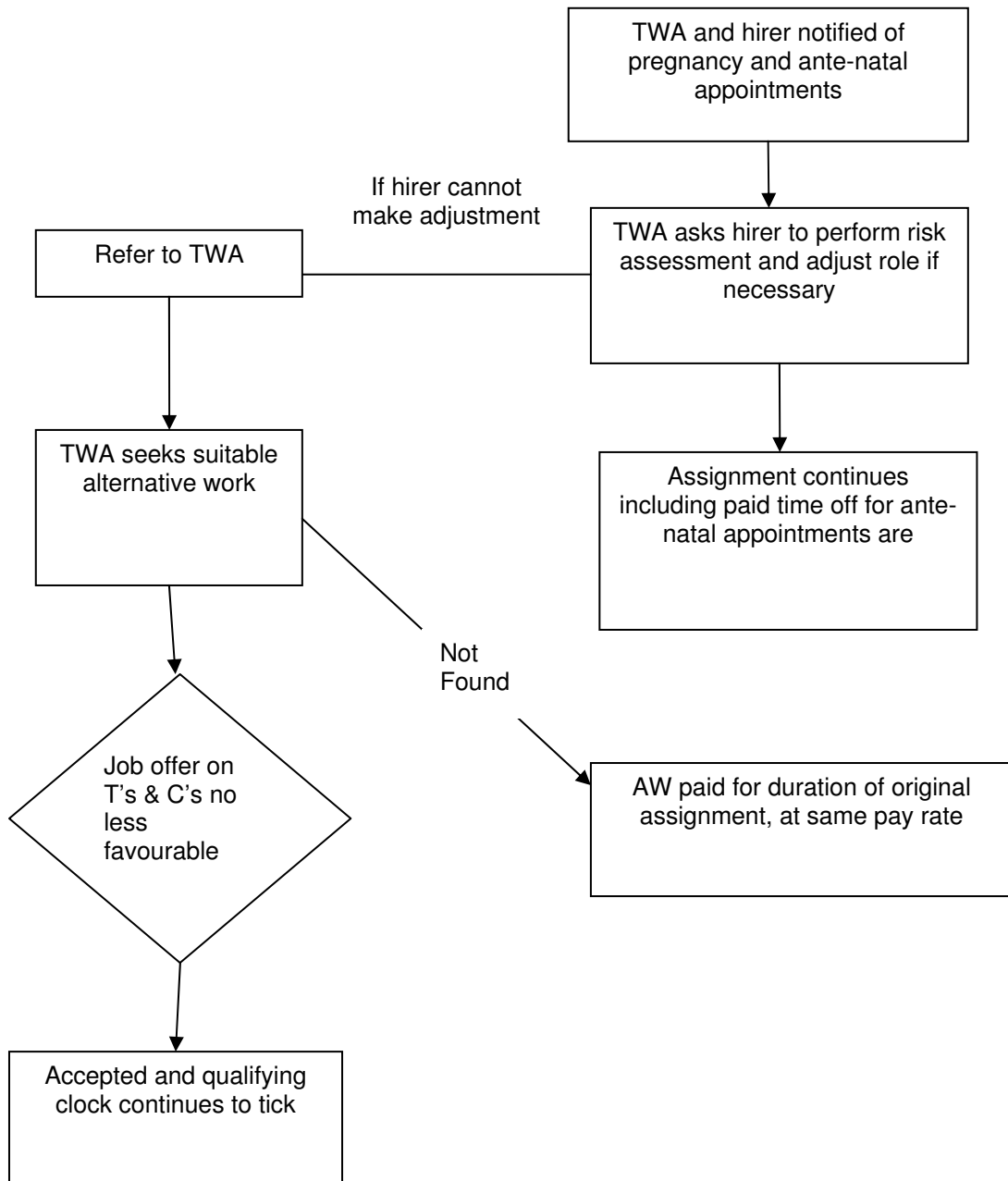
The payment will be the agency worker's current hourly rate and must be paid for each hour that she misses of her assignment. The agency worker can be required to provide evidence of her appointments (though not for the first appointment which is usually to confirm the pregnancy). It is reasonable to ask an agency worker to give an estimate of how long an appointment will last and how long it will then take her to get to work.

Antenatal care may include relaxation or parent craft classes as well as medical examinations, if these are recommended by the agency worker's doctor.

You will need to bear in mind that ante-natal clinics can be busy places and patients are not always seen on time and the payment covers the entire appointment including the time taken to and from the appointment if it's during assignment hours.

Direct.gov advice to individuals is to try to avoid taking time off work where you can reasonably arrange classes or examinations outside working hours.

**See below for pregnant agency workers process flowchart.**



# Pay between assignments

## At a glance

There is an **exemption from equal treatment provisions on pay** where an agency can offer an agency worker a permanent contract of employment and pay the agency worker between assignments i.e. during the periods when they are not working when there are no available suitable assignments for the agency worker. This means that after 12 weeks in a given job, the agency worker will not be entitled to the same pay as if they had been recruited directly.

The TWA must explain this to the agency worker so they can make an informed decision as to whether they are willing to agree to forgo this entitlement and enter into a permanent contract with them.

The rate of pay between assignments must be at least 50% of on assignment pay, above [NMW](#) and calculated from the highest number of hours and highest pay rate from the previous 12 weeks. This is in addition to a wider range of statutory employment rights available to employees.

## New entitlements

All agency workers, including those covered by this pay between assignments exemption, are entitled to other new provisions under the regulations – in particular equal treatment in relation to the duration of working time, night work, rest periods and rest breaks and annual leave after 12 weeks.

Additionally they must receive day 1 entitlements as these rights apply regardless of these agency workers being on a pay between assignments contract.

## Permanent contract of employment

To qualify for this exemption, from the outset and before the first assignment, the TWA and worker must be given a [permanent contract of employment](#) with the TWA and agree the terms and conditions that will apply across assignments and the level of pay between these assignments.

These contracts must comply with the requirements in the regulations regarding certain specified conditions such as;

- minimum pay rates and their basis of calculation
- location of work, reflective of where the agency worker is willing to travel
- minimum and maximum expected hours (e.g. an agency worker may only be available for 2 days per week so a 5 day assignment would not be 'reasonable')
- type of work
- a statement that makes clear that the employee contract is foregoing entitlements under regulation 5 in so far as they relate to pay

Additionally the pay between assignments must be at least 50% of assignment pay based on previous 12 weeks and not below the [National Minimum Wage \(NMW\)](#). It applies to the calendar weeks in between assignments where the agency worker is available to work but has no assignment, and such pay is

calculated at the highest pay rate and hours enjoyed in the course of the previous 12 weeks - where the previous assignment lasted longer than 12 weeks, or during the previous assignment, where it was shorter than 12 weeks.

The pay between assignments derogation does not apply to periods between two short assignments which fall within the same week. This reflects the fact that regulation 7(4) provides that any week during which an agency worker works during an assignment covered by regulation 10 counts as a full calendar week e.g. allowing a worker on a derogation contract to accrue service towards the 12 week qualifying period for other relevant terms and conditions under regulation 5 apart from those relating to pay.

The regulations refer to contracts of greater than 'one hour' per week in order to demonstrate that providing a 'zero hours' contract (which may not provide a sufficient amount of mutuality of obligation, required in an employer/employee relationship) will not meet the requirements of the derogation from the right equal treatment as to pay under regulations 10 and 11.

It should be noted that any attempt to use this pay between assignments derogation under regulation 10 for a different purpose to that envisaged by article 5(2) of the Directive (which allows a derogation as to pay, in the context of a worker who has the comfort of employed status and enjoys the certainty of a fair level of pay where there is genuinely no assignment available), is likely to be found to be unlawful. In that situation any such purported contracts are likely to be unenforceable. In particular, where one or more temporary work agencies and their hirer clients seek to use contracts that purport to intersperse periods of assignment with short working weeks – perhaps including as little as one hour's work only – in arrangements where there may not be any actual period of pay between assignments, this will not comply with the purpose of regulation 10 or with the requirements of the Directive. Such an approach is likely to form a basis for claim under one or more of the remedies available to agency workers, under regulations 9 (structure of assignments), 17 (detriments) and 18 (breaches of contracts or duties) of the Agency Workers Regulations. It is likely to be seen as an attempt to deny agency workers the right to equal pay under regulation 5 and/or a denial of access to a reasonable amount of pay between assignments, the purpose for which the derogation was designed.

The intention is that the TWA and agency worker will agree the minimum and maximum (see [48 hour working time agreement](#)) number of hours that they consider reasonable and a true reflection of their requirements in order agree to the terms and conditions of the contract.

The agency worker will need to receive at least 4 weeks of pay between assignments (at the 50% rate or NMW) before the contract is ended. The agency must take reasonable steps to find a suitable assignment and where it does this, the agency worker will not be able to complain of a breach of the agreement or allege that a right to equal treatment arises under regulation 5.

### **A 'reasonable' offer of employment**

From the outset, and before the first assignment, the TWA and agency worker will need to discuss, agree and note in a written contract what the agency worker is willing to accept on any particular assignment.

## **Ending a pay between assignments contract**

If the agency worker refuses a suitable assignment; i.e. in accordance with what was agreed in the permanent contract, the TWA can terminate the contract, subject to the requirement for the TWA to give 4 weeks pay (under regulation 10(1) If a TWA has offered 4 weeks of 'reasonable' work. They may notify the agency worker that they are giving 4 weeks notice in parallel.

If the agency worker resigns; the TWA must pay the 4 weeks notice period.

If the TWA dismisses the agency worker; the TWA must pay the 4 weeks pay between assignments unless it is due to gross misconduct, in which case the agency worker is in breach of their contract and foregoes this entitlement.

## **Pregnant workers working on a pay between assignments contract**

The maternity provisions, where a worker is suspended for health and safety reasons, apply for the length of the original intended duration of assignment or likely duration of the assignment - whichever is the longer.

Once these provisions no longer apply - i.e. they wouldn't otherwise be performing the original assignment - from that point the pay would be determined by the pay between assignments contract.

## **Illustrative examples**

### **An agency worker on a production line who usually work 40 hours a week or an agency worker who drives and works on a variety of different assignments with different hirers each week**

When there is a quiet period and the agency worker is not needed, the TWA pays the agency worker for the weeks where there is no work, in the event that they cannot find the agency worker similar work elsewhere.

### **When an agency cannot find work for an agency worker**

An agency worker works for a hirer for 4 weeks at £10.00 per hour for 40 hours. The agency cannot find the agency worker a suitable job the next week so they are entitled to at least 50% of rate of pay as long as it is above the NMW. Therefore the agency worker is entitled to 40 hours x NMW and will be paid this amount for up to 4 weeks where there is no work

# How to identify 'basic working and employment conditions'

## At a glance

This section covers how to help ensure that an agency worker receives the same or no less favourable treatment as if they had been recruited directly, after a 12 week qualifying period in a particular role. It demonstrates how to identify the correct terms and conditions and when you might choose to make reference to a comparable employee.

## How equal treatment is established

Deciding what "equal treatment" means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job. You can take into account the agency worker's qualifications, experience or expertise (or lack of them) – you simply need to provide the treatment you would have given that person if recruiting them directly to that job.

Equal treatment is not required in respect of all the terms and conditions that the person would have received had they been recruited directly. It covers basic working and employment conditions. Equal treatment rights also only extend to these conditions if they are ordinarily included in relevant direct employees' contracts of employment. This means terms and conditions formally set out in:

- (a) A pay scale or pay structure; or
- (b) A relevant collective agreement; or
- (c) A company handbook or similar.

It also means conditions included in permanent employees' written contracts as a matter of course – those terms that are included in contract in usual circumstances, perhaps in the majority of cases.

So to recap, the equal treatment right concerns basic working and employment conditions that apply generally when the hirer recruits people to do the relevant job concerned because they have been either formally set out or are included as a matter of course. It does not apply to terms and conditions that do not come within this, or in workplaces in which no 'basic working and employment conditions' can be said to apply generally.

In most cases equal treatment can be simply established by giving the same relevant entitlements "**as if**" he/she had been recruited as an employee or worker to the same job, i.e. what pay and holidays would he/she would be entitled to, given a particular role and his/her particular skills and qualifications.

The hirer may wish to demonstrate that the same or no less favourable treatment has been provided by comparing the agency worker with an existing employee doing a broadly similar role. In many workplaces, e.g. a call centre, the agency worker may be working next to an employee recruited directly. Where that employee's relevant terms match the agency worker's and where they are consistent with the terms the hirer usually gives employees recruited to

full that job, then the hirer and the agency will be deemed compliant with the regulations.

If an agency worker is a unique hire and therefore there is not a comparator, as in all scenarios, agency workers will be entitled to any relevant terms in respect of relevant basic working and employment conditions which 'apply generally' in the workplace.

For example, if the hirer always grants new hires 28 days' leave in their first year, this is likely to have been an agency worker's entitlement if he or she had been hired direct. Relevant terms and conditions outlined in company handbooks, employment contracts and collective agreements may be taken into account by the courts in determining equal treatment.

In all cases, it is important to ensure that the proper comparison is being made. For example, if an agency worker is hired to carry out a job on a part-time, fixed-term or flexible basis, they will be entitled to the relevant terms that would have applied had they been recruited direct to work on a part-time, fixed-term or flexible basis.

In the event of a dispute, a hirer would have to demonstrate that it is a provision that they apply to directly recruited staff, therefore inventing an artificial 'starter grade', specifically to reduce the terms and conditions to which an agency worker would be entitled, would not be deemed compliant.

## Illustrative examples

### Where a hirer has pay scales or pay structures

A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience. However the agency worker is paid at the bottom of the pay scale. Is this equal treatment?

Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then the agency worker would be entitled to the same treatment.

### Where there are no pay structures

A hirer has decided to increase its workforce on a particular shift with agency workers. There are 10 permanent staff and 3 agency workers, doing the same work. The permanent employees are paid between £8-10 per hour– those recruited most recently being paid £8 per hour, the higher rate reflecting on the job experience. The work involves no specialist skills and only minimal on-job training. The agency workers are recruited at a rate of £6 per hour and continue to be paid at that rate after 12 weeks. Is this allowed?

No; there is clearly a rate of at least £8 for the job and the agency workers would be entitled to at least this after 12 weeks on the assignment.

### Where there are no pay scales or structures or comparable permanent employees

A company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12 week qualifying period. Is this allowed?

Yes; there are no pay scales or collective agreements, or a 'going rate', so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However if, say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public holidays, the agency worker should be entitled to the same treatment on these points.

### All directly recruited terms individually negotiated

A sales company pays its 10-person sales force at different rates. The rates vary considerably and all depend on individual negotiation. There is no going rate. An agency worker is paid at the same rate before and after the qualifying period. Is this equal treatment?

Yes; if all rates really are individually negotiated and there is no established custom and practice as regards pay – which the hirer and agency would need to be very clear was the case. But, as in the previous example, if there is a clear company policy on, for instance, annual leave, the agency worker would be entitled to equal treatment in that respect.

### In summary

	Comparator for basic terms and conditions	Comparator for access to facilities	Comparator for access to vacancies
Employee only	Yes*	No	No
Employee or worker	Yes*	Yes	Yes
Working for & under the supervision and direction of the hirer	Yes	Yes	Yes
Engaged in same or broadly similar work**	Yes	Yes	Yes
Based at same establishment	Yes	Yes	Yes
Based at different establishment	Yes	Yes	Yes
Must still be employed/engaged	Yes***	Yes	Yes

\* The "as if" comparison can be made with both employees and workers; for the purposes of identifying a deemed comparator under regulation 5(3) and (4), the required "flesh and blood" comparator must be an employee

\*\* If relevant, qualifications and skills may be taken into account

\*\*\* This relates to the identification, under regulation 5(3) and (4), of any deemed comparator.

# Information requests, liability and remedies

## At a glance

This section covers;

- the information required by a TWA before placing an agency worker on assignment
- when a TWA should ask the hirer for information about basic working and employment conditions following 12 weeks in a given job
- compliance information required by a TWA from a hirer
- what steps the agency worker can take to obtain information from the agency and hirer
- what happens if an agency worker does not receive a response to their request and if they are unsatisfied with the response
- how a claim to an employment tribunal is dealt with given multiple parties are involved and penalties that a tribunal might award

However, it is always preferable for disputes to be solved in the workplace at the earliest opportunity, minimising costs, stress and time involved for all parties.

## Information

### Information a TWA must have before supplying an agency worker

For each vacancy a TWA (“the agency”) receives from a hirer, they must record details about the vacancy including the details as set out in separate, pre-existing legislation, the [Conduct Regulations](#), before they introduce or supply an agency worker to that hirer. The [Gang masters licensing](#) apply in the food and agricultural and shellfish sectors.

### When a TWA should ask a hirer for information about basic working and employment conditions

It may be clear at the start of an assignment that it will last for more than 12 weeks and the TWA might ask for information at an early stage – or even in advance of the assignment starting. But this is a matter between the TWA and hirer and no timescale has been deliberately set out in the regulations.

In some instances the assignment may be scheduled to last for less than 12 weeks but is extended. In this situation, the TWA should contact the hirer to obtain information as the agency worker can request information, in writing, any time after the 12 weeks have elapsed.

## Compliance information required by a TWA from a hirer

A TWA cannot supply an agency worker to a hirer without certain information due to existing legislation (refer to [Conduct Regulations](#));

- the identity of the hirer, nature of business and location
- start date and duration of assignment
- job role, responsibilities and hours
- the experience, training, qualifications and any authorisation which the hirer considers are necessary, or which are required by law, or by any professional body in order to work in the position
- any risks to health or safety known to the hirer and what steps the hirer has taken to prevent or control such risk
- any expenses payable by or to the work-seeker

In addition, a hirer will need to provide the TWA with the following details in order to comply with the regulations (usually found in standard terms and conditions or a company handbook), if and when an agency worker completes 12 weeks in a given job;

- the level of **basic pay** (based on the annual salary an agency worker would have received if recruited directly, usually converted into hourly or daily rate, taking into account any pay increments)
- if and when there are **overtime payments** and **shift/unsocial hours** allowances or **risk payments for hazardous duties**
- types of **bonus** schemes they operate (and how individual performance is appraised)
- if they offer **vouchers** which have monetary value
- **annual leave entitlement**

While day 1 entitlements are the responsibility of the hirer, it may be useful for the TWA to enquire about the facilities on their premises and how they provide information on their job vacancies.

### Working through multiple TWAs

It is essential that correct hirer information is supplied from one TWA to another where there are also intermediaries involved in the supply of an agency worker, such as master or neutral vendor arrangements or umbrella companies. In the event of a claim, the Courts would decide which party was responsible for any breach to the extent that it is responsible for the infringement.

## Process for an agency worker to obtain information

Agency workers are entitled to information relating to their equal treatment entitlements. This process depends on what aspect of equal treatment they are requesting information on.

- if it is in relation to **Day 1** entitlements (such as access to information on vacancies or access to on-site facilities), then the requirement to provide information lies with the hirer and information can be requested any time after the start of the assignment (a hirer might provide information direct to the agency which in turn passes it to the agency worker in advance of the assignment starting or the hirer might issue information as part of the induction of agency workers)
- if it is about entitlements **after the 12 weeks qualifying period** then the requirement to provide information lies with the TWA and the agency worker can only request information after the 12 weeks have elapsed.

Agency workers should be encouraged to talk to the TWA in the first instance as the TWA will often be able to resolve difficulties without resorting to formal procedures or to liaise with the hirer to ensure the agency worker receives the information.

However, if this informal approach does not provide a resolution, then under the regulations an agency worker can take the following action.

If it is in relation to Day 1 entitlements, for example access to facilities such as child-care or car-parking, the agency worker should approach the hirer direct with a written request for information. The hirer has 28 days to respond in writing from receipt of the request.

### **The hirer should provide;**

- a written statement with all relevant information relating to the rights of a comparable worker or employee; and
- reasons for the treatment of agency workers

For access to facilities, the hirer may have good reasons why the agency worker is treated differently which is permissible but can be challenged. Different treatment requires objective justification. Essentially, hirers would have to ask themselves “is there a good reason for treating the agency worker less favourably?” Cost may be a factor but by itself is unlikely to justify different treatment. Practical considerations could be a factor – for example the child care facility may be at full capacity. Where there is a waiting list system then the agency worker should be treated in the same way as a comparable employee or worker.

If the request is in relation to basic working and employment rights applicable after 12 weeks in a given job, the agency worker cannot request information until the 12 weeks have elapsed. In this instance the agency worker can request a written statement from the TWA about any aspect of equal treatment they do not believe they were receiving.

**The TWA has 28 days from receipt of the request setting out;**

- relevant information relating to basic working and employment conditions e.g. rate of pay, number of weeks of holiday as set out in company handbooks, usual contractual terms etc
- any relevant information or factors that were considered when determining the basic working and employment conditions – for example, if there is a pay scale where the agency worker is put on the pay scale
- where the equal treatment is based on a comparable employee (doing the same or similar work), the information describes the terms and conditions applicable to that employee, explains any difference in treatment, e.g. lower rate of pay, based on qualifications, skills, experience and expertise.

**If an agency worker does not receive a written statement about basic working and employment conditions:**

If an agency worker has not received a written statement within 30 days of making that request, the agency worker can then write to the hirer requesting the same information. The agency worker has to wait until the agency has had the chance to respond before approaching the hirer.

**In summary**

<b>Entitlement</b>	<b>Who must provide written info</b>	<b>When can the agency worker challenge their treatment on assignment</b>
Can I use the company car park? Can I use on site child care facilities?	Hirer	Day 1. The hirer has 28 days from receipt of the written request to respond in writing
I do not consider I am receiving the correct holiday entitlement/rate of pay?	Agency in first instance; then hirer	After 12 weeks has elapsed. If a response is not received from the agency within 30 days of making the request then the agency worker can write to the hirer who has 28 days from receipt to respond.

## **If an agency worker is unsatisfied with the response or does not receive a response:**

An agency worker can bring a claim to an Employment Tribunal in relation to their rights in the regulations. The Employment Tribunal can draw an adverse inference from the fact that a written statement that was requested was not provided.

To help resolve matters without the need for court intervention, [ACAS](#) will be able to get involved in pre and post claim conciliation.

## **Liability and remedies**

### **Responsibilities in the event of a claim**

If it is in relation to Day 1 entitlements then responsibility rests with the hirer, the TWA will not be held liable because they do not have a role in delivering these entitlements as the agency has no influence or role in providing access, for example, to a company canteen.

If it is in relation to basic working and employment conditions then it can be the TWA and/or the hirer. The agency will be initially responsible for breach of the equal treatment principle. However, it will have a defence if it can show that it took "reasonable steps" to obtain relevant information from the hirer about its basic working and employment conditions and treated the agency worker accordingly.

The hirer will be responsible for any breach to the extent that it is responsible for the infringement. So, if a hirer had failed to provide information to the TWA as to what constituted equal treatment and the agency worker was not receiving appropriate treatment under the regulations, then the liability could be the sole responsibility of the hirer. It is therefore in the interests of all parties to exchange information in a timely manner and agencies should put in place reminders so they can check with the hirer if there have been any changes to terms and conditions and pay rates which affect agency workers.

In a tribunal claim, where the responsibility or a breach of regulations is not clear, or has not been conceded, as between TWA and hirer, the agency worker may claim against both the TWA and the hirer at the outset. This does not mean that a tribunal can be asked to find that there is "joint and several liability" for breaches. The regulations ensure that any party in the chain of relationships (i.e. a hirer or a TWA) can be named at the outset or joined to a claim and be liable to the extent that the tribunal finds they are to blame for the infringement.

### **If a tribunal upholds an agency worker's complaint:**

The tribunal will generally be able to award financial compensation (and penalties in certain circumstances), make a declaration setting out the agency worker's rights in relation to the complaint and/or recommend that the hirer/TWA takes certain action to remove the adverse effect on the agency worker.

## **What an agency worker will receive:**

The agency worker will be compensated for any loss of earnings related to their entitlements under the regulations – or receive an appropriate level of compensation, for example if they have been denied access to a facility. There is no maximum award but there is a minimum award of two weeks of pay regardless of the value of the loss, unless Employment Tribunal finds that the agency worker behaved unreasonably, having the power to reduce the award if it is just and equitable. In many cases, the claim would be very little and should be rectified before going to the Employment Tribunal.

Where the agency was unaware that there had been previous service with a hirer in a particular post that could be aggregated with new service proposed at that hirer, this could mean that the 12 week qualifying period would be reached earlier. This situation could arise where the hirer was a large company or where the company has multiple sites. If an agency worker arrives on site for a new assignment and realises that they have been engaged there previously, they should inform the agency straight away.

If an agency worker brings a claim and has not told the agency or hirer they worked for the hirer before (and were therefore already entitled to equal treatment or qualified before the 12 weeks elapsed) a tribunal can take this into account when deciding the level of compensation in any claim.

## **Anti-avoidance measures to encourage compliance**

The regulations contain an “anti avoidance” provision designed to prevent structures of assignments that are put in place to intentionally circumvent the regulations.

In all circumstances, the agency worker must have completed at least two assignments or two roles (in substantively different roles which break the qualifying period) with the same hirer or connected hirers within the same group, in order for the anti-avoidance provisions to become relevant.

Factors which would indicate that a pattern of assignments was structured with the intention to deprive the worker of equal treatment rights could be;

- the number of assignments
- the length of assignments
- the number of role changes
- whether the role changes were substantively different
- the length of break periods

It would still ultimately be for a Tribunal to decide whether the pattern of assignments indicated an intention to deprive the worker of his or her rights, weighing evidence from the worker that one or more of the factors applied against evidence from the hirer/agency that the motivation behind the pattern was different and legitimate.

## Illustrative examples

**An agency worker makes a claim after being rotated between companies that are legally connected in the same group, into similar roles with regular frequency**

If this happens, the Employment Tribunal may consider that the motivation behind this action was to deprive the agency worker of equal treatment. In these circumstances the agency worker will be deemed to have completed the 12 weeks qualifying period or will retain the entitlement to equal treatment.

This could result in a penalty of up to £5,000 against the hirer or agency or split between parties in a way the tribunal considers just and equitable.

## Other factors

This section covers other factors that are affected by the Agency Workers Regulations;

- thresholds for bodies representing agency workers; from 1 October 2011 temporary agency workers will count towards the thresholds in Temporary Work Agencies for the purposes of calculating the thresholds above which a representative body may be established. This will not apply to agency workers that are employees of the TWA
- information of workers' representatives; you must provide relevant information on the use of agency workers supplied in all the situations where there is currently an obligation on employers to provide information on the employment situation

### Thresholds for bodies representing agency workers

Employees have a number of rights to establish bodies to represent their interests in discussions with management. The rights are not automatic and depend on threshold provisions which establish the minimum number of workers or employees an organisation must employ before they come into effect.

The laws that establish these rights do not state that representative bodies should automatically be established. They allow employees to instigate a procedure which may lead to the establishment of a representative body.

The Directive does not give new representational or consultative rights to temporary agency workers. The Directive requires agency workers to count towards the calculation of the thresholds above which the existing rights in these areas are calculated. In the UK this will apply to the TWA where the worker is registered and not to the hirer.

If a temporary agency worker has a relationship with two or more agencies the agency worker could potentially count towards the threshold of each one, because they may have ongoing relations with each. However, if a person 'on the books' of the temporary work agency has not been supplied to a hirer or an intermediary by the agency they cannot subsequently be included in the thresholds count as they will not meet the definition of an 'agency worker'.

### Representative bodies

There are various types of representative bodies which are established to enable employers and employees to communicate, consult and negotiate effectively with each other. These include ongoing, broad-topic bodies such as European Work Councils and Information and Consultation representative bodies and also those set up for specific issues, such as Transfer of Undertakings (TUPE) representative bodies, and Health and Safety representative bodies.

The law does not apply to the establishment of a representative body for the purposes of collective redundancy. Because they are not employees, temporary

agency workers cannot in the legal sense be made redundant, therefore cannot be counted towards such a threshold.

If you are a temporary work agency you will need to consider the qualifying points after which a temporary worker may be entitled to be counted towards the threshold count for the purposes of establishing a representative body at your agency.

### **Information of workers' representatives**

There are various situations where you have a statutory obligation to provide information to employees and their representatives about the employment situation at your business. This includes ongoing mechanisms such as collective bargaining, Joint Consultative Committees and European Works Councils. It also covers issue-specific situations including collective redundancies and Transfer of Undertakings (TUPE) situations.

The regulations provide that where information is provided on the employment situation, information should also be provided on the use of agency workers. The information must be provided to employees or their representatives.

#### **Information must include:**

- the total number of agency workers engaged
- the areas of the business in which they are utilised
- the type of work they are contracted to undertake

The definition of information to be provided does not include information on agency workers' terms and conditions.

In addition to the various pieces of legislation that have been amended, you have a statutory duty to provide information relating to temporary agency workers under the Safety Representative and Safety Committee Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996.

As a hirer you will need to put processes in place to manage the additional administrative procedures that this requires. You will also need to know your obligations and the financial penalties which may apply if the legislation is breached. Further details on statutory obligations can be found on [ACAS](#).

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