

# Client Alert.

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## Agency Worker Regulations 2010

By Caroline Stakim

*The Agency Workers Regulations 2010 (the “Regulations”) came into force in the UK in October this year. The legislation gives temporary agency workers equal rights to certain employment and working conditions as those employees recruited directly.*

### WHO IS AN AGENCY WORKER UNDER THE REGULATIONS?

An agency worker is someone who works temporarily under the supervision and direction of the hirer but has a contract with a temporary work agency.

### WHAT NEW RIGHTS DO THE REGULATIONS GIVE AGENCY WORKERS?

Under the Regulations, agency workers will be entitled to:

- **Day One Rights:** equal access to collective facilities and amenities such as canteen, transport or crèche facilities and to information on job vacancies as that provided by the hirer to its comparable employees or workers from day one of an assignment; and
- **Qualifying Period Rights:** equal *basic working and employment conditions* to which they would have been entitled had they been directly recruited by the hirer after completing twelve weeks in the same role for the same hirer.

### WHAT ARE BASIC WORKING AND EMPLOYMENT CONDITIONS?

Basic working and employment conditions are those terms and conditions in relation to pay, duration of working time, night work, rest periods and rest breaks, annual leave and paid time off for ante-natal care that are ordinarily offered by the hirer to comparable employees. The specific working and employment conditions due will need to be assessed for each agency worker, and given it is in comparison to the hirer’s employees, the hirer seems best placed to carry out that comparison.

### WHAT IS INCLUDED AS PAY?

Pay is any sum payable in connection with employment that is not one of the excluded payments listed below:

- Bonus/commission unrelated to amount/quality of work
- Occupational maternity, paternity or adoption pay
- Occupational sick pay
- Advances of pay or loans

# Client Alert.

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- Payments for time off for training for 16-17 year olds
- Payments made otherwise than in capacity as a worker
- Financial participation scheme payments
- Guarantee payments
- Expenses
- Pension payments
- Redundancy pay
- Payments for acting as pension scheme trustee or employee representative
- Payments for time off for ante-natal care, to look for work or for training on redundancy or to carry out trade union duties

Note that bonuses which are unrelated to the amount or quality of the work or contribution of the individual and which are additional, discretionary payments, are not included in the definition of pay, whereas bonuses or commission payments that are paid by reference to the amount or quality of work of the individual worker are.

## WHO IS A COMPARABLE EMPLOYEE?

A comparable employee is an employee of the hirer who is engaged in the same or broadly similar work (taking into account skills and qualifications required for the role) who is based at the same establishment as the agency worker. Only where there is no such comparable employee, can a comparison be made with an employee at a different establishment.

## HOW IS THE 12-WEEK QUALIFYING PERIOD CALCULATED?

Rights to equal basic employment and working conditions apply only after the agency worker has completed twelve consecutive calendar weeks in the same role for the same hirer. Calendar weeks accrue regardless of how many hours the agency worker carries out on a weekly basis and it is possible for an agency worker to work for more than one hirer at the same time.

For any agency workers already on assignment when the Regulations came into force, their qualifying period will begin on 1 October 2011. The earliest date any agency worker can benefit from the right to equal basic employment and working conditions is therefore 24 December 2011.

Careful records must be taken of any absences from or breaks in assignments and the reason for those because depending on the nature of the absence or break, it could either (1) break continuity; (2) not break continuity but count towards the qualifying period; or (3) not break continuity but not count towards the qualifying period. Details of each are set out in the table below:

# Client Alert.

Breaks in continuity of qualifying period	<ul style="list-style-type: none"> <li>• New assignment with new hirer</li> <li>• Different role with same hirer</li> <li>• Break between assignments with same hirer of no more than 6 weeks</li> </ul>
Absences that do not break continuity but count towards qualifying period	<ul style="list-style-type: none"> <li>• Breaks due to pregnancy, childbirth or maternity during pregnancy and up to 26 weeks after childbirth</li> <li>• Breaks for maternity leave, adoption leave or paternity leave</li> </ul>
Absences that do not break or count towards continuity of qualifying period	<ul style="list-style-type: none"> <li>• Break for any reason of no more than six weeks</li> <li>• Sickness absence or jury service absence of up to 28 weeks</li> <li>• Annual leave absence</li> <li>• Regular or planned shutdowns</li> <li>• Strikes, lock out or other industrial action</li> </ul>

## IS THERE ANY WAY OUT?

The Regulations contain express anti-avoidance provisions designed to prevent hirers and agencies from structuring assignments to ensure that no agency workers attain the Qualifying Period Rights. Where the Tribunal is satisfied that the hirer and/or agency has attempted to do so, the agency worker will be deemed to have completed the qualifying period (provided the agency worker has completed at least two assignments or two roles for the same hirer or hirers within the same group). In determining this the Tribunal will consider factors such as the length and number of assignments, length of break periods, number of and changes to roles and the reason why the assignments were structured in the way they were.

Agencies and hirers can prevent an agency worker being entitled to the Qualifying Period Rights by engaging them on a permanent minimum contract. However, along with other written formalities for the contract that must be complied with, during any period that that agency worker is not on an assignment, he or she must be paid at least 50% of the highest level of what they have been paid during the last 12 weeks of their last assignment.

## PROVISION OF INFORMATION

Agency workers have a contract with and therefore are paid by an agency, not by the hirer. The right to equal treatment however, is comparable to employees of the hirer. In order to allow the agency to comply, the hirer must therefore provide relevant information to the agency and this will include details of its employment contracts, pay scales and pay structures, any relevant collective agreements as well as any company handbook, policies or benefit schemes in place. The mechanics of how and when this information is requested and provided is for agreement between the parties.

# Client Alert.

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## STATUTORY INFORMATION REQUESTS

Agency workers have the right to request information from a hirer and/or an agency if they believe they are not being afforded their rights under the Regulations. Requests must be made in writing and responded to in writing within 28 days.

## WHO IS LIABLE FOR BREACHES OF THE REGULATIONS?

*Failure to provide day one entitlements:* Given the agency's lack of control over the provision of the hirer's collective amenities and facilities, the hirer will be liable for this (except where the failure to do so is objectively justified).

*Failure to provide equal basic employment and working conditions:* This falls on either the agency or the hirer to the extent that each is responsible for the failure. For example, where the agency is able to show that it took reasonable steps to obtain relevant information from the hirer and the hirer either failed to provide it or provided it inaccurately and that it acted on reliance of that information, it will have established a defense and liability will lie with the hirer.

An employment tribunal, on finding that there has been a breach of the Regulations, can (a) award compensation (which will generally be for a minimum of two weeks' pay and is uncapped); (b) declare the agency worker's rights; and/or (c) recommend action by the agency or hirer to negate the adverse effect on the agency worker.

*Breach of anti-avoidance provisions:* Where the tribunal considers there to be a breach of the anti-avoidance provisions, it may make an additional award of up to £5,000.

*Automatic unfair dismissal and detriment:* Agency workers also have the right to bring an automatic unfair dismissal claim or claim that they have been subjected to an unlawful detriment where the principal reason for their dismissal or detriment is that they asserted or are believed or suspected of being about to assert their rights under the Regulations or have given evidence or information about proceedings brought by another agency worker. For unfair dismissal, the normal one year qualifying service requirement does not apply, however, the agency worker would first need to show that they were an employee and not simply a worker. As in other unfair dismissal claims, compensation is capped at approximately £75,000. For detriment, compensation is calculated on the same basis as claims for failure to provide equal basic employment and working conditions.

*Failure to comply with statutory information request:* There is no claim for this, however, an Employment Tribunal may draw an adverse inference from it in any other related proceedings.

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# Client Alert.

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