



PRACTICAL OPTIONS AND THE AWR

The Agency Workers Regulations 2010 (“Regulations”) will come into force on 1 October 2011. As a result of the Regulations, after a 12 week qualifying period agency workers will be entitled to the same basic working and employment conditions as if they had been directly recruited by the hirer to the same job. The Regulations also include new entitlements for agency workers from day one of their assignment with regards to access to facilities and amenities at the workplace and the right to be notified of any relevant vacancies.

As a result of the new rights which are being introduced, many businesses which either supply agency workers to end users or engage them via an agency are considering the options available to them in order to limit the impact of the Regulations.

Unlike certain other legislation that affects the recruitment sector, there is no “opt out” from the Regulations. The Regulations provide one potential option to recruitment businesses, which will avoid the requirement to give parity of pay (only) through compliance with Regulation 10 of the Regulations. This has become known as the “Swedish Derogation” and involves the agency worker being engaged on a contract of employment by the agency and being paid between assignments. This option will be the subject of future bulletins.

There are a number of other options that are being considered in the market as to how to tackle the Regulations. These are considered in more detail below:

1. “Managed Service Option”

This option aims to lift the labour provider out of the definition of “temporary work agency” under Regulation 4, defined as (our emphasis):

“A person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of:

- (a) Supplying individuals to work temporarily for and under the supervision and direction of hirers; or*
- (b) Paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.”*

The managed service option involves altering the business model of the labour provider so that it is providing a managed service rather than acting as a temporary work agency. Effectively, the new structure would mean that workers are no longer working “temporarily for and under the supervision and direction of hirers”, as is required under Regulation 4.

Tribunals are likely to look beyond attempts to avoid the Regulations through bogus arrangements, so labour providers should be able to demonstrate they are genuinely a managed service, for example by:

- Fully training and supervising the workers
- Subjecting the workers to their disciplinary policy
- Organising the workers’ shift patterns, rotas, cover and attendance recording
- Managing pay, bonuses, holidays and other benefits.



2. “Recruitment Service Option”

To be an “agency worker” under Regulation 3(1), and therefore for the Regulations to apply, there are two conditions to fulfil:

- (a) The worker is supplied by the temporary work agency to work temporarily for and under the supervision and direction of the hirer; and
- (b) The worker has either a contract of employment with the agency or “any other contract to perform work and services personally for the agency”.

The recruitment service option seeks to lift the worker out of the definition of “agency worker” under Regulation 3(1)(b), by ensuring that there is no contract between the worker and the agency.

Using this option, the agency is paid for introducing workers to the hirer which then employs/engages the worker directly. The arrangement means that the temporary work agency is carrying out more the role of an employment agency (rather than an employment business), i.e. receiving payment for introducing candidates who are then engaged directly by the end user. The end user will be engaging the workers itself either under a flexible contract of employment or a contract for services.

3. “French Extension”

This option involves end users implementing a “training grade” for all new starters, whether temporary or permanent workers. This is a common model in France where, for example, during the first six months of any new worker’s employment/engagement, they receive lower pay and fewer benefits because they are being trained.

Agency workers are entitled, under Regulation 5(1), to:

“The same basic working and employment conditions as [they] would be entitled to for doing the same job had [they] been recruited by the hirer:

- (a) *Other than by using the services of a temporary work agency; and*
- (b) *At the time the qualifying period commenced.”*

The comparator using this option could be a permanent employee on the training grade, carrying out the same or broadly similar work as the agency worker. The agency worker would only be entitled to the same lower rate of pay and limited benefits as the permanent new starters subject to the training grade.

The effect of this is that:

- The agency worker’s rights are still subject to the 12-week qualifying period
- After this 12-week period, the agency worker has the right to the same basic working and employment conditions as the permanent employees who are on the training grade
- This would continue until the period for the training grade comes to an end, after which time the agency worker is entitled to the same basic working and employment conditions as comparator employees who have completed their training period.

NOTE: The qualifying period and the training period will run concurrently, meaning that this model is only effective if the training period is longer than 12 weeks. This is because Regulation 5(1) states that the worker is entitled to the same basic working and employment conditions as if they had been recruited *at the time the qualifying period commenced*, at which point they would have been subject to the training grade.



4. Harmonisation

This option addresses the administrative costs of implementing the Regulations by attempting to harmonise the terms of temporary workers with permanent staff.

The end user may be able to reduce the pay of its permanent employees to “meet in the middle”, although this is of course subject to permanent employees’ contractual rights and the end user’s ability to vary the contract.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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