



QUALIFYING PERIOD FOR EQUAL TREATMENT

Regulation 5(1) of the Agency Workers Regulations 2010 (“the Regulations”) provides that a qualifying agency worker has the right to the same basic working and employment conditions as he would have been entitled to if he had been directly recruited by the hirer. Regulation 5 is only applicable once an agency worker has completed the qualifying period.

Regulation 7(2) confirms that: *“to complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments”*. For clarification, the 12 week qualifying period is not retrospective. An agency worker will only begin to accrue the 12 week qualifying period once the Regulations have come into force on 1 October 2011.

Regulation 7(3) confirms that an agency worker works *“in the same role”*, unless:

- (a) The agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency
- (b) The work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role
- (c) The temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role.

What will be considered to be *“substantively different”* work or duties carried out by an agency worker will depend on the facts of each individual case. The BIS guidance contains a list of example characteristics that may be taken into account when determining whether an agency worker’s work or duties are substantively different, including: different skills and competences being used; pay rates; location; working hours; equipment; a different line manager and that the role requires extra training and / or a specific qualification that wasn’t required for the previous role.

Regulation 7(3) confirms that a temporary work agency must provide a description of the new role in writing to the agency worker. However, the BIS guidance appears to go further than the requirements of the Regulations by stating that: *“The TWA should record details about the new vacancy and notify the agency worker, in writing, that their role has substantively changed and that the qualifying period will start again.”* Whilst this may be sensible from a practical perspective, it is not in fact a requirement of the Regulations.

The Regulations confirm that an agency worker must work in the same role and with *“the same hirer”* in order to accrue the qualifying period.

Regulation 7(4) provides that: *“any week during the whole or part of which an agency worker works during an assignment is counted as a calendar week.”* This means that an agency worker must be working during an assignment in order for a calendar week to count towards the qualifying period under the Regulations.

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For the purposes of determining whether the weeks worked by an agency worker are continuous or not, a clock metaphor is commonly used to explain the accrual of the 12 week qualifying period (“the Qualifying Clock”). Using the same metaphor, the circumstances in which the Qualifying Clock will be reset, paused or continue to run are explored in detail below.

When will the Qualifying Clock reset?

Regulation 8 confirms that, where an agency worker has completed the qualifying period with a particular hirer, Regulation 5 shall continue to apply, until:

- (a) That agency worker is no longer working in the same role with that hirer; or
- (b) There is a break between assignments, or during an assignment, when the agency worker is not working, to which Regulation 7(8) does not apply.

If either of these conditions are met, the agency worker will lose his right to receive the same basic working and employment conditions as he would have been entitled to if he had been directly recruited by the hirer. The requirements of Regulation 7(8) are discussed below.

Temporary work agencies will need to ensure that any change to an agency worker’s role meets the requirements of Regulation 7(3) and is not made in an attempt to avoid the qualifying period. The Regulations contain anti-avoidance provisions, which are specifically designed to deal with attempts by hirers and / or temporary work agencies to prevent an agency worker from being entitled to equal treatment under Regulation 5 through the structuring of assignments. An Employment Tribunal has discretion to make an award of up to £5000 in circumstances in which the anti-avoidance provisions apply.

When will the Qualifying Clock pause?

Regulation 7(5) confirms that where there is a break falling within Regulation 7(8), any continuous weeks worked by an agency worker before that break will be carried forward, provided that the agency worker returns to work in the same role and with the same hirer. This means that the Qualifying Clock will pause, rather than being reset, and continuity will not be broken under the Regulations.

Regulation 7(8) applies where there is a break between assignments, or during an assignment, when the agency worker is not working, and the break is:

- (a) For any reason and the break is not more than six calendar weeks
- (b) Due to the fact that the agency worker is incapable of working in consequence of sickness or injury
- (c) Related to pregnancy, childbirth or maternity, which takes place during pregnancy and up to 26 weeks after childbirth
- (d) For the purpose of taking time off or leave (including maternity, adoption, paternity leave and any other time off or other leave)

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- (e) Due to the fact that the agency worker has been summoned to jury service, provided that the break is 28 calendar weeks or less
- (f) Due to a temporary cessation in the hirer's requirement for any worker to be working in a particular role for a pre-determined amount of time and in accordance with the established custom and practices of the hirer
- (g) Due to a strike, lock-out or other industrial action at the hirer's establishment; or
- (h) Due to more than one of the reasons listed in (b) - (g) above.

Disappointingly, the BIS guidance fails to clarify whether references to the Qualifying Clock "pausing" means that any fraction of a week will remain accrued when the clock restarts, or whether only fully accrued weeks will count towards the qualifying period. For example, if a worker's original assignment started on a Monday but the clock paused on a Thursday with 3 days being accrued in that week, if the worker returned to work on the following Tuesday, would this mean that the day of the week on which each new week is fully accrued under the Regulations would be a Wednesday? Alternatively, would a full week still be accrued on a Friday as is usually the case for an assignment starting on a Monday?

When will the Qualifying Clock continue to tick?

Regulation 7(6) confirms that where an agency worker has started working in a role during an assignment and is unable to continue working:

- For a reason related to pregnancy, childbirth or maternity at a time during pregnancy and up to 26 weeks after childbirth
- Wholly for the purpose of taking time off or leave, whether statutory or contractual, to which the agency worker is otherwise entitled which is:
 - (a) Ordinary, compulsory or additional maternity leave
 - (b) Ordinary or additional adoption leave; or
 - (c) Paternity leave.

The agency worker shall be deemed to be working in that role with the hirer *"for the original intended duration, or likely duration of the assignment, whichever is the longer"*. This means that the Qualifying Clock will continue to run irrespective of the fact that the agency worker is on a break and is not actually working during the assignment.

Unfortunately, the Regulations and the BIS guidance do not clarify what will be taken into account in order to determine the duration of the agency worker's original assignment. There is a risk that if a temporary work agency engages its agency workers on day-to-day assignments, but there is an expectation at the start of the relationship that in fact the assignment will last for longer than one day, then the temporary work agency may be deemed to have intended the assignment to continue for longer than one day.

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Further, it may be deemed an act of avoidance under the Regulations if the temporary work agency then seeks to deny an agency worker equal treatment on the basis that the duration of the agency worker's original assignment was a day and the agency worker has not met the qualifying period.

Additional Rights

Under the Regulations, an agency worker is entitled to receive equal treatment in respect of collective facilities and amenities and access to employment during an assignment. For clarification, agency workers will receive these rights from day one of working on an assignment.

Regulation 13(1) confirms that an agency worker has, during an assignment, the right to be informed by the hirer of any relevant vacant posts with the hirer, to give the agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

Regulation 12(1) of the Regulations provides that an agency worker has, during an assignment, a right to be treated no less favourably than a comparable worker in relation to collective facilities and amenities as soon as they start working on an assignment.

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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