



ANTI-AVOIDANCE

Pursuant to Regulation 7 of the Agency Workers Regulations 2010 (“the Regulations”), the right for agency workers to receive equality of treatment in relation to “relevant terms and conditions” with their permanently employed counterparts (including pay, duration of working time and annual leave – see Regulation 6) is subject to the agency worker completing a 12 week qualifying period.

However, hirers and temporary work agencies should be aware of anti-avoidance provisions set out in the Regulations which prevent a series of assignments from being structured in such a way as to prevent the worker from completing the qualifying period, or from continuing to be entitled to the equal treatment rights.

By way of counteracting the possibility of agencies deliberately limiting agency workers’ assignments to 12 weeks or less in order to circumvent the requirement to give those workers the same treatment as they would be entitled to had they been employed directly by the hirer, Regulation 9 provides that a worker will be deemed to have completed the qualifying period from the time at which they would have completed the qualifying period but for the structure of the assignment or assignments. Similarly, an agency worker will continue to be entitled to the equal treatment rights if he/she has completed the qualifying period but becomes no longer entitled to the equal treatment rights due to the structure of the assignment or assignments.

The above only applies where the agency worker in question has:

1. Completed two or more assignments with a hirer
2. Completed at least one assignment with a hirer and one or more earlier assignments with hirer(s) connected to that hirer; or
3. Worked in more than two roles during an assignment with a hirer, and on at least two occasions has worked in a role that was not the “same role” (as defined at Regulation 7) as the previous role.

An agency worker will only be entitled to parity under Regulation 9 where:

1. The most likely explanation for the structure of the assignment(s) is that the hirer, the temporary work agency supplying the agency worker to the hirer, or the hirer and one or more connected hirers intended to prevent the agency worker from being entitled to, or from continuing to be entitled to the rights conferred by Regulation 5 (i.e. equal treatment); **and**
2. the agency worker would be entitled to, or would continue to be entitled to, the rights conferred by Regulation 5 in relation to the hirer, but for that structure of assignments.

Regulation 9(5) sets out various factors which shall be taken into account in determining whether the structure of the assignment(s) shows that the most likely explanation for it is as set out above. These are:

1. The length of the assignments
2. The number of assignments with the hirer and, where applicable, connected hirers
3. The number of times the agency worker has worked in a new role with the hirer (and any connected hirers), and that new role is not the “same role” as defined at Regulation 7
4. The number of times the agency worker has returned to work in the same role within the meaning of Regulation 7 with the hirer and any connected hirers
5. The period of any break between assignments with the hirer and any connected hirers.

For the purposes of Regulation 9, hirers are connected to a hirer if one hirer directly or indirectly has control of the other hirer or a third person directly or indirectly has control of both hirers.

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In circumstances where it is found that there has been a breach of the anti-avoidance provisions set out in Regulation 9, the Tribunal may make an award of up to £5,000.

As confirmed in the guidance issued by the Department for Business Innovation & Skills:

“A hirer can obviously decide not to engage agency workers beyond the 12 week qualifying period. There is nothing in the Regulations to prevent an agency worker being released after say 11 weeks or for assignments of 12 weeks to be the usual practice of any hirer. However, hirers and TWAs 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 12 weeks with a 6 week break and then a further 12 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 the completion of the qualifying period but it would need to be clear that the attempt was deliberate. This would be a matter for the Tribunal in the event of a claim.”

Please note that the rights of agency workers set out in Regulations 12 and 13 of the Regulations, namely to access to collective facilities and amenities and access to employment, are not dependent on any qualification period and therefore apply from day one of an agency worker’s 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.

If you no longer wish to receive the bulletin please let us know by return e-mail to kimberley.malcolm@brabnerscs.com

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