



DEFINITION OF "PAY"

The Agency Workers Regulations 2010 ("the Regulations") provide that a worker will be entitled to equal treatment in respect of basic working and employment conditions on completion of the qualifying period.

Regulation 6(1) defines the "*relevant terms and conditions*" in respect of which equal treatment must be provided and includes those relating to pay, the duration of working time, night work, rest periods, rest breaks and annual leave.

Regulation 6(2) of the Regulations defines "pay" as:

"Any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3)"

This is an "all or nothing" provision, which means that agency workers cannot accrue the right to the same holidays and benefits as comparable employees without also being entitled to receive the same pay under the Regulations.

The Regulations confirm that any monetary value attaching to any payment or benefit in kind furnished to a worker by the hirer shall not be treated as pay of the worker, unless it is a voucher or stamp which is:

- Of fixed value expressed in monetary terms, and
- Capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

Under Regulation 6(3), the payments or rewards expressly excluded from the definition of pay include:

- Any payment by way of occupational sick pay
- Any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office
- Any payment in respect of maternity, paternity or adoption leave
- Any payment referable to the worker's redundancy
- Any payment or reward made pursuant to a financial participation scheme
- Any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done (such as to encourage the worker's loyalty or to reward the worker's long-term service)
- Any payment for time off for carrying out trade union duties
- A guarantee payment under the Employment Rights Act 1996

LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

MANCHESTER

55 King Street, Manchester M2 4LQ
0161 836 8800

PRESTON

7-8 Chapel Street, Preston PR1 8AN
01772 823921



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- Any payment by way of an advance under an agreement for a loan or by way of an advance of pay
- Any payment in respect of expenses incurred by the worker in carrying out the employment; and
- Any payment to the worker otherwise than in that person's capacity as a worker.

The issue of bonuses is likely to cause some difficulties as only bonuses that are not linked directly to a worker's performance are excluded. Therefore, it is likely that individual bonus arrangements will fall within the definition and will need to be paid after the qualifying period.

In its Guidance, BIS asserts that notice pay (statutory and contractual linked to loss of employment) is excluded from the definition of pay. However, notice pay is not specifically listed amongst the exemptions under Regulation 6(3).

It appears that BIS may be trying to bring notice pay within the exemption of *"any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office"*. However, it is arguable that if the actual or hypothetical comparator's contract contains or would contain a non-discretionary payment in lieu of notice clause, then this may still fall within the definition of 'pay'.

Regulation 10 provides an option for temporary work agencies to be exempt from the requirement to provide parity of pay (as defined) to agency workers under the Regulations, known as the "Swedish Derogation". Regulation 10 sets out a number of requirements that must be met by the temporary work agency if it intends to rely on the exemption, including the need to employ the agency worker on a permanent contract of employment and to pay the agency worker between assignments. One issue which has arisen is whether holiday pay falls within the definition of "pay" (and therefore equal treatment is not required) or "annual leave" (in which case equal treatment would still be required even where Regulation 10 is complied with). This issue will be dealt with in more detail in future bulletins covering the Swedish Derogation more extensively.

In our view, the definition of pay seems extremely wide such that many types of payments will fall within the definition. Examples of what may be included are shift pay and standby pay which agencies need to factor in, in addition to "basic pay". The difficulty for agencies will be in interpreting which parts of a bonus will be considered as being included in pay.

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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LIVERPOOL

Horton House, Exchange Flags, Liverpool L2 3YL
0151 600 3000

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0161 836 8800

PRESTON

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