



DEFINITION OF “AGENCY WORKER” – WHAT IS THE SCOPE OF THE AGENCY WORKERS REGULATIONS 2010?

Following the implementation of the Agency Workers Regulations 2010 (“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.

Definitions

The Regulations only apply to “agency workers” as defined under Regulation 3(1) as:

“an individual who:

- (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
- (b) has a contract with the temporary work agency which is:
 - (i) a contract of employment with the agency, or
 - (ii) any other contract with the agency to perform work or services personally.” ***

A temporary work agency (“TWA”) is defined at Regulation 4 as:

“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.”

However, a “person” (including a company) will not fall within the definition of a TWA if:

“the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.”

This exclusion will apply to, for example, most outsourced payroll providers.

In Scope

Therefore, the key elements required for someone to be an agency worker are:

- There is a contract between the worker and a TWA, either an employment contract or a contract to perform work personally
- That worker is temporarily supplied to a hirer by the TWA
- When working on assignment the worker is subject to the supervision and direction of that hirer; and
- The individual in question is not in a business on their own account (where they have a business to business relationship with the hirer who is a client or customer).



THE AGENCY WORKERS REGULATIONS 2010 BULLETIN

An individual will be treated for the purposes of Regulation 3(1)(a) as having been supplied by a TWA to work temporarily for and under the supervision and direction of a hirer (Reg 3(3)) and will be treated as having a contract with the TWA (Reg 3(4)) if:

*“(a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and
(b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.”*

Regulation 3(5) goes on to clarify that certain things will not preclude an individual from being defined as an agency worker for the purposes of the Regulations. These things are:

- The TWA supplying the individual through one or more intermediaries;
- One or more intermediaries supplying that individual;
- The individual being supplied pursuant to any contract or other arrangement between the TWA, one or more intermediaries and the hirer;
- The TWA paying for the services of the individual through one or more intermediaries; and
- The individual being employed by or otherwise having a contract with one or more intermediaries.

This confirms that the supply of workers through any intermediary will not negate the application of the Regulations. This will include the use of umbrella companies, and neutral and master vendors. In such circumstances, **both** the “traditional” agency and the umbrella or master/neutral vendor are likely to fall under the definition of a TWA.

Out of Scope

The latest BIS Guidance on the Regulations sets out those who are likely to be outside of the definition of an agency worker as including:

- Individuals who find work through a TWA but are in business on their own account (where they have a business to business relationship with the hirer who is a client or customer)
- Individuals working on Managed Service Contracts where the worker does not work under the direction and supervision of the host organisation – common examples of a Managed Service arrangement include the provision of catering or cleaning services and further details can be found in Bulletin 2 of this series
- Individuals working for in-house temporary staffing banks where a company employs its temporary workers directly (and they only work for that same business or service)
- Individuals who find direct employment with an employer through an “employment agency”
- Individuals on secondment or loan from one organisation to another – this is usually where the main activity of the organisation seconding the individual is not the supply of individuals to work temporarily under the supervision and direction of another party.

The above reference to a worker being in business on their own account relates to the exemptions to the definition of agency worker set out at Regulation 3(2), which states:

“...an individual is not an agency worker if:

(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

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



THE AGENCY WORKERS REGULATIONS 2010 BULLETIN

(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual."

The BIS Guidance on the Regulations has sought to clarify what is meant by an individual being in a profession or business undertaking carried out by the individual where the hirer is a client or customer of the individual – a genuine business to business relationship:

"A profession is normally someone who is certified by a professional body such as a doctor or lawyer. Normally a professional or a person in business providing services to a client or customer is not working under that person's supervision or direction. But it is still possible for someone in a profession or in a business to be an agency worker if there is no such client or customer relationship."

BIS have also pointed out that simply putting earnings through a limited company will not in itself put individuals beyond the possible scope of the Regulations. Although individuals may choose to do this for flexibility or tax purposes, where the relationship between the individual, TWA and hirer remains essentially a three-sided relationship (and a hirer is not a client or customer of the individual), they are likely to be in scope.

In the event of a dispute, in order to establish if a worker is genuinely in business on their own account (i.e. a business to business relationship), the courts have developed a number of tests which examine the individual's circumstances and consider all aspects of the relationship, including what a contract may or may not say, the expectations of the parties and their conduct, in order to establish the reality of the relationship. Ultimately, where there is a dispute, it will be for the Employment Tribunal to decide the reality of the relationships between the parties involved and may, for instance, look at whether the type of arrangements in place are common for the type of worker involved.

*** STOP PRESS

This is the new wording of Regulation 3(1)(b)(ii), which has replaced the original wording – *"any other contract to perform work and services personally for the agency"* – following the publication of the Agency Workers (Amendment) Regulations 2011. The amendment removes any suggestion of a requirement for the agency worker to be providing work and services personally to the agency. This makes sense as agency workers will normally provide work or services to the hirer (the end user), rather than to the temporary work agency itself.

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

This bulletin is for general guidance purposes only and should not be used for any other purpose

Brabners Chaffe Street is a Limited Liability Partnership



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