



HIRERS AND CONNECTED HIRERS UNDER THE AGENCY WORKERS REGULATIONS 2010

The Agency Workers Regulations 2010 (“the Regulations”) provide agency workers with a right to equal treatment in respect of basic working and employment conditions following completion of a 12 week qualifying period. 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 of the Regulations confirms that an agency worker must work *“in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments”* in order to complete the qualifying period. Consequently, the definition of a “hirer” will be a fundamental part of determining whether an agency worker has completed the qualifying period.

A “hirer” is defined at Regulation 2 as:

“A person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person.”

A person is not limited to a natural person in this context. The BIS Guidance states that a company, partnership, sole trader and public body are all examples of a “person” for these purposes. Further, Regulation 2 confirms that the “person” engaged in economic activity need not operate for profit, which reaffirms that charities and public bodies are capable of falling within the definition of a “hirer”.

The Guidance states that a new hirer must be a different person (a different legal entity). The Guidance asserts that a hirer will have its own legal identity and that a company will not be considered to be a separate hirer if it does not have its own legal identity. Whilst this appears to be helpful in practical terms, temporary work agencies and hirers should be aware that the Regulations do not expressly state that this is the case.

The Guidance also states that *“where a single hirer has multiple sites merely moving the worker from one site to another will not usually break continuity (unless it is a substantively different role...)”*. The Guidance then specifically draws attention to the anti-avoidance provisions which prevent a series of assignments from being structured in such a way as to prevent the agency worker from completing the qualifying period.

To that end, Regulation 9 of the Regulations deals with situations in which a temporary work agency or a hirer seek to prevent an agency worker completing the qualifying period under the Regulations through changes to the structure of the agency worker’s assignment(s), which includes the changing of the hirer to whom the agency worker provides services to.

Regulation 9 of the Regulations confirms that, if the provisions of Regulation 9(3) and (4) are met, an agency worker will be treated as having completed the qualifying period from the time at which the agency worker would have completed the qualifying period *“but for the structure of the assignment or assignments”*.

For clarification, on satisfying the requirements of Regulation 9(3) and (4) 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.

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Regulation 9(3)-(4) of the Regulations state that:

“(3) This paragraph applies when an agency worker has:

(a) Completed two or more assignments with a hirer (H);

(b) Completed at least one assignment with H and one or more earlier assignments with hirers connected to H; or

(c) Worked in more than two roles during an assignment with H, and on at least two occasions has worked in a role that was not the “same role” as the previous role within the meaning of regulation 7(3).

(4) This paragraph applies where:

(a) The most likely explanation for the structure of the assignment, or assignments, mentioned in paragraph (3) is that H, or the temporary work agency supplying the agency worker to H, or, where applicable, H and one or more hirers connected to H, intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, the rights conferred by regulation 5; and

(b) The agency worker would be entitled to, or would continue to be entitled to, the rights conferred by regulation 5 in relation to H, but for that structure.”

Accordingly, the circumstances in which a hirer will be considered to be connected to another hirer under the Regulations will have a fundamental impact on whether an agency worker will be treated as having completed the qualifying period for the purposes of Regulation 9.

Regulation 9(6) confirms that:

“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.”

The Regulations do not offer any explanation of what will be considered to be direct or indirect control for these purposes. The Guidance states that the anti-avoidance provisions under the Regulations will cover, for example, the situation where an agency worker is moved back and forth across a group (where there is common ownership via holding companies and subsidiaries) and the intention is to deprive the agency worker from receiving equal treatment. However, the Guidance does not specifically deal with what constitutes direct and indirect control for the purposes of one hirer being connected to another hirer.

In the Guidance, there also appears to be a focus on the frequency that the agency worker is rotated within a group of companies. An example is given of an agency worker who makes a claim after being rotated between companies that are legally connected in the same group, into similar roles and with regular frequency. The Guidance states that, if this happens, an Employment Tribunal may consider that the motivation behind this action was to deprive the agency worker of equal treatment.

If challenged regarding the structure of assignments, a temporary work agency and/or a hirer would be permitted to adduce evidence that the motivation behind the structure of assignments was legitimate. It would be for the Employment Tribunal to weigh this evidence against evidence produced by the agency worker to the contrary. 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.



Until there is case law in this area to clarify the exact meaning of direct and indirect control, hirers and temporary work agencies should exercise caution with regard to the structure of assignments and any changes to the hirer that the agency worker is supplied to (within a corporate group or otherwise).

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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