SpeechlyBircham

August 2011

Briefing

Be prepared: the agency workers regulations 2011

The controversial Agency Workers Regulations 2010 will have a profound impact upon the way in which an employment business (or "temporary work agency") and its clients (or "hirers") use temporary agency workers. Agencies and their clients will have to work together to comply with the obligations to give agency workers limited rights to equal treatment. Otherwise each could find themselves liable for breach.

The Regulations are complex and will inevitably be tested and challenged in the courts. Even before the Regulations come into force on 1 October 2011, the Government has just had to issue amendment regulations to correct defects in the drafting.

What are the key points which most agencies and hirers need to know?

What are the Regulations about in a "nutshell"?

The Regulations provide agency workers with the right to the same basic working and employment conditions after 12 weeks service as if they had been directly recruited by the hirer.

Scope: who is covered by the Regulations?

The Regulations apply to an "agency worker" supplied and contracted by an agency to work temporarily for and under the supervision of a hirer – in the classic triangular relationship.

They will not apply to workers who are genuinely self-employed or who work on a "managed service contract" where the supplying contractor provides a service to the client and genuinely supervises and directs that worker itself.

Similarly, the Regulations will not apply to in-house staffing banks where the worker contracts directly with the hirer or end-user. However, if the staff bank is operated by a group company which supplies workers to work under the direction of another group company, then the Regulations will be engaged.

Individuals supplied through an umbrella company or by other intermediaries (such as master and neutral vendors) will also normally fall within the Regulations.

When do the Regulations take effect?

The Regulations come into force on 1 October 2011. Hirers must from "day one" provide information about vacancies within the hirer and access to on-site facilities (eg canteen, childcare) from the start of an assignment.

The core right to equal treatment in basic working and employment conditions is not triggered until the agency worker has met the 12 week qualifying period in the same role for the same hirer.

Speechly Bircham LLP 6 New Street Square London EC4A 3LX
Tel +44 (0)20 7427 6400 Fax +44 (0)20 7427 6600 DX 54 Chancery Lane email information@speechlys.com web www.speechlys.com

Therefore, no agency worker can qualify earlier than 24 December 2011. Detailed rules govern when the clock "pauses" and "stops" for the purposes of calculating the qualifying period.

What is the right to equal treatment?

After qualifying, an agency worker is entitled (and continues to be entitled) to receive from the agency "the same basic and working employment conditions" as if he had been recruited directly by the hirer for doing the same job. Those conditions comprise – "pay", duration of working time, night work, rest periods, rest breaks (including lunch breaks) and holiday. They should be capable of being identified from the relevant terms and conditions ordinarily included in the contracts of the hirer, including in handbooks, pay scales and collective agreements.

Where an agency worker is genuinely placed in an assignment where the hirer does not have anyone performing the same role and there are no standard pay scales or collective agreements, then the agency is free to pay that worker at the market rate. Similarly, the agency is not required to match one-off or individually negotiated "pay" arrangements.

"Pay" means basic pay, overtime, shift and other premiums, commission, bonus for work done, customary discretionary payments and vouchers with monetary value. However, it does not include sick pay, pension, share participation or profit sharing schemes, maternity, paternity or adoption pay, compensation and redundancy payments for termination, benefits-in-kind or bonus payments not paid for loyalty, long service or a reason other than the amount or quality of work done.

There will be a defence for both the agency and the hirer which will be deemed compliant if an agency worker's treatment can be shown to be consistent with a comparable employee (not worker) of the hirer, doing the same or broadly similar work under the same relevant terms and conditions as the agency worker. The deemed compliance defence is an incentive for agencies and hirers to co-operate in sharing relevant information.

What is the "Swedish derogation"?

There is an exemption from the obligation to provide equal treatment in respect of pay where the agency worker has a permanent contract of *employment* with the agency under which he has a right to receive a minimum level of pay between assignments. That contract must comply with strict requirements in order to be valid.

Even if it does comply, the agency and the hirer must comply with all obligations under the Regulations other than in respect of pay.

Anti-avoidance

The Regulations contain an express provision which deems an agency worker to have met the 12 week qualifying period if he has been prevented from doing so by virtue of a "structure of assignments" (eg rotating workers and engineering breaks between jobs which purport to be different) which was intended for that purpose. A Tribunal can also make an additional award of compensation of up to £5,000 against the agency, the hirer or both.

Who is liable for breach?

The agency will be liable for breaches of the agency worker's rights to basic working and employment conditions, to the extent to which it is responsible. However, the agency may come into conflict with its own hirer client by taking advantage of the defence that it took "reasonable steps" to obtain relevant information from the hirer and then acted reasonably in determining what amounted to the workers' basic working and employment conditions. If the agency can establish this breach, the hirer will be liable for the breach – creating a potential conflict between the hirer and the agency.

The hirer will be responsible for any breach to the extent it is found to be responsible eg by failing to provide information or by providing inaccurate information. Agencies and hirers will therefore have to consider how and whether to apportion responsibility (and blame) for breaches – which could prompt difficulties in the commercial relationship or encourage each to seek indemnities from the other.

The Tribunal can decide to join the hirer to any claim brought by the agency worker within the normal three month limitation period and to release the agency from any such claim.

Only the hirer will be liable for breach of the "day one" rights to provide access to collective facilities and information on vacancies within the hirer.

Agency workers have a right to request written information within 28 days concerning compliance with the right to equal treatment and (from the hirer only) concerning access to collective facilities and the right to be informed of vacancies. The responses are admissible as evidence in any proceedings. Tribunals can draw adverse inferences from any failure to provide information or evasive or equivocal responses.

The remedies open to the Tribunal are a declaration, compensation or a recommendation the specified action should be taken to reduce the adverse effect of any breach identified. Failure to comply with a recommendation can lead to increased compensation or to an award where no such award was originally made.

There is no cap on the compensation which Tribunals can award. In most cases, it will be the amount which the Tribunal considers "just and equitable" having regard to the breach in question and the loss attributable to that breach, including expenses incurred and loss of benefits.

Contact

If you have any queries or require any further information, please do not hesitate to contact:

Trevor Bettany, Partner at Speechly Bircham LLP
+44 (0)20 7427 6421
trevor.bettany@speechlys.com