

# **Employment Law Briefing 9 June 2011**

## **The Agency Workers Regulations 2010**

Guidance Notes Update

Introduced by:

Anne Corder, Anne Corder Recruitment

Speaker:

Martin Bloom, Hegarty LLP Solicitors



Anne Corder Recruitment



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# Employment Law at Hegarty LLP

Hegarty LLP Solicitors has a prominent reputation for providing practical first-class employment law advice to its clients in this fast moving area of law. The Employment lawyers understand the challenges facing human resources professionals, and are proactive in developing close working relationships with clients. The team is well known throughout Peterborough and Stamford, but the calibre of our lawyers has meant we have been highly successful at attracting national clients.

## Speaker Profile

### Martin Bloom – Head of Employment, Partner



**Martin became a Partner at Hegarty LLP in 1983, is Head of the Employment Law department and has been with the firm since 1979.**

**Expertise.** Employment law, from drafting employment contracts and consultancy agreements to representation at employment tribunals across the country.

**Experience.** Martin has over 30 years' employment law experience and is an accomplished presenter undertaking a large number of seminars and courses each year, including national conferences, in-house training and breakfast updates. He holds regular employment law updates with the local CIPD group and has published a book addressing the issue of bullying and stress in the workplace. For a number of days a year Martin sits as a Part Time Employment Tribunal Judge in the East Midlands region. He is a member of the Industrial Law Society and the Employment Lawyers Association.

**Clients.** Martin advises a very wide range of businesses and individuals on all matters relating to employment law. His clients range from individuals to large multinational organisations and 'high street' names employing thousands of people in the UK and beyond.

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# Anne Corder Recruitment

## ACR: Engaged, Expert, Ethical



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While first and foremost we endeavour to fulfil our core role as a provider of recruitment services, the Anne Corder Recruitment ethos has always been to add value to every client.

We don't stop – or start - at finding you the right candidate for your vacancy. Our recruitment partners can work with you to develop – and deliver – a full package of services from strategic planning to evaluating newly placed candidates.

Our seminars, salary survey, judging, sponsorship, student involvement and engagement in environmental projects all feed into our knowledge and expertise which is then available for our clients to utilise.

Alongside that, sits our credibility and integrity, firmly rooted in our desire to always provide the best service – and our refusal to play the numbers game.

We have never been a 'post box' agency. CVs and candidates are carefully screened to ensure those put forward for a position have not just the necessary skill sets and experience but are also a 'fit' with the client.

We'd rather introduce one carefully selected candidate who we know is perfect for the client's vacancy than 15 who 'might do'.

The ability to do that comes from our commitment to working closely with in-house recruiters – whether that be an HR department or the managing director of a small business. That leaves us as well placed as they are to identify the right candidate. For the client, that represents a big time – and therefore cost – saving. That's real value we can add to every business we work with.

During our 16 years of operation our remit has widened as demand has changed. We now regularly place interim and project staff, unusual when the business opened in 1994, as well as the more traditional temporary and permanent staff. The range of disciplines has also broadened and we regularly place candidates in roles including IT, e-commerce, marketing, finance, HR, operations, business support, administration and more from entry up to director level.

All this is reflected in our new tag line:

- Engaged...with you, for you.
- Expert...so you don't have to be.
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They're phrases which, we are confident, explain what we do, why we do it and how we do it.

And they're also promises to every single one of our clients and candidates.

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# Agency Workers Directive Seminar

9 June 2011

DeafBlind UK, Peterborough



# Welcome

**Anne Corder**

**Anne Corder Recruitment**



Anne Corder Recruitment

# Agency Workers Regulations 2010

**Martin Bloom**

**Partner & Head of Employment Law,  
Hegarty LLP Solicitors**



**Hegarty**

# Introduction

- The EC Temporary Agency Workers Directive 2008/104
- The Agency Workers Regulations 2010
- In Force 1<sup>st</sup> October 2011



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# Who are covered?



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# The Principle of Equal Treatment

- Basic working and employment conditions
- Relevant Terms and Conditions
- Comparable Employees



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# Relevant Terms and Conditions

- Included items
- Excluded items



# Annual Leave



# Qualifying Period



# Day One Rights



# Rights to Access to Employment

## INTERNAL VACANCIES



The following vacancies are currently available at ABTA:



[Senior Public Relations Manager](#)

New position in ABTA's Communications team

closing date: 07 Jun 2011



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# Liability of Agency and Hirer



# Right to Receive Information



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# Claims to Employment Tribunals



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## The Agency Worker

- There is a contract between the worker and the Temporary Work Agency (TWA)
- The worker is temporarily supplied to a hirer by the TWA
- When working the worker is subject to the supervision and direction of the hirer

## The Agency Worker

### **And**

- The worker is not in business on his/her own account



## Workers trading through limited companies



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## Managed service contracts



## In-house temporary staffing banks



## Access to facilities and information



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## Calculating the 12 week qualifying period



## Equal treatment and comparators



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## Definitions of pay

- Bonus payments
- Performance appraisal systems



## Pregnant workers and new mothers



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## Compliance information



# Questions & Answers



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## THE AGENCY WORKERS REGULATIONS 2010

### **1. Introduction**

- 1.1 The EC Temporary Agency Workers Directive (2008/104) was passed by the European Parliament in October 2008. EU Member States became obliged to transpose the Directive into national law by 5<sup>th</sup> December 2011. The Agency Workers Regulations 2010 come into force on 1<sup>st</sup> October 2011.
- 1.2 The European Directive provides for Equal Treatment between temporary agency workers and permanent employees or workers in terms of basic working and employment conditions covering such matters as working time, overtime, breaks, night work, holidays and, of course, pay.
- 1.3 After a considerable amount of debate and public consultation involving both Unions and Employer's organisations the Regulations have now reached the statute book. It is estimated that the additional cost to both public and private businesses will be in the region of £1.8 billion and will involve HR professionals in spending about 1½ hours per agency worker in dealing with administration issues arising from the Regulations.

### **2. Who are covered?**

- 2.1 Workers supplied by a temporary work agency to work “temporarily for and under the supervision and direction of a hirer” will be covered. The Regulations do not apply to Employment Agencies who seek to provide permanent positions for workers. In essence the Regulations cover “temps”. – Regulation 3(1).
- 2.2 Temporary workers who are supplied to the Hirer through intermediary companies will be covered – Regulation 3 (3).
- 2.3 Genuinely self employed workers i.e. those who work for a Hirer or Temporary Work Agency in a client / customer capacity are not covered – Regulation 3 (2).
- 2.4 The definition of “Agency Worker” has the same impact as the definition of “worker” in the Working Time Regulations 1998.
- 2.5 The use of loopholes such as Intermediaries and Umbrella Companies to avoid the Regulations is specifically excluded – Regulations 3 (4) and 3 (5).

### **3. Equal Treatment**

- 3.1 The Regulations provide Agency Workers with an entitlement to the same “basic working and employment conditions” as they would be entitled to for doing the same job had they been recruited by the Hirer – Regulation 5 (1).
- 3.2 The “basic working and employment conditions” are further defined as “the relevant terms and conditions that are ordinarily included in the contracts of workers of the Hirer” – whether by Collective Agreement or otherwise – Regulation 5 (2).
- 3.3 The Regulations introduce the concept of “comparable employees”. – Regulation 5 (3).

- 3.4 An employee is a comparable employee in relation to an Agency worker if, at the time of any alleged breach of the Regulations, the employee and the Agency worker are working for and under the supervision and direction of the Hirer and are engaged in the same or broadly similar work (and where relevant having regard to any similar level of qualification and skill) and where they are based at the same establishment or if a comparable employee is based at a different establishment. – Regulation 5 (4).
- 3.5 The Regulations deal with the comparison between an Agency worker and an employee of the Hirer on an “as if” approach. An Employment Tribunal will be able to construct, hypothetically, how the Agency worker would have been treated in comparison to the employee. The Agency worker will need to produce some evidence of how comparable employees are treated.
- 3.6 An Agency worker cannot use a comparable employee whose employment has ceased – Regulation 5 (5).

#### **4. Relevant Terms and Conditions**

- 4.1 These include terms and conditions relating to: -
- Pay
  - The duration of working time
  - Night work
  - Rest periods
  - Rest breaks
  - Annual leave
- Regulation 6 (1).
- 4.2 “Pay” includes fee, bonus, commission, holiday pay or other emolument referable to the employment – Regulation 6 (2).
- 4.3 Items excluded from the definition include:-
- Occupational sick pay
  - Pension
  - Maternity, paternity or adoption pay
  - Redundancy payments
  - Share option schemes or profit share schemes
  - Any bonus, incentive payment or reward which is not directly attributable to the amount of quality of work done by the worker – Regulation 6 (3).
- 4.4 Some benefits of a fixed monetary value will be included such as luncheon vouchers but there is doubt over whether such items as staff discounts are covered.

#### **5. Annual Leave**

- 5.1 Agency workers are entitled to the same statutory entitlement to holidays as all other employees and workers i.e. 5.6 weeks paid leave.
- 5.2 If a Hirer provides its employees with more than the statutory minimum the Agency worker will be able to claim the same amount as a comparable employee.

## **6. Qualifying Period**

- 6.1 Agency workers are not entitled, however, to equality in respect of basic working and employment conditions from “day one”.
- 6.2 An Agency worker must work for the Hirer for a continuous period of 12 weeks or more. – Regulation 7 (2).
- 6.3 The Agency worker must complete the “same role” for a continuous period of 12 weeks or more.
- 6.4 Any part of a week will count as a week e.g. if an Agency worker only works on Mondays each week 12 continuous Mondays will constitute the qualifying period.
- 6.5 To constitute a new role the work undertaken by the Agency worker must be “substantively” different to the work or duties of the previous role – Regulation 7 (3) (b).
- 6.6 These provisions will prevent a Hirer from simply changing the Agency workers job title every 11 weeks. But an Agency worker who undertakes cleaning for six weeks and then undertakes the role of a driver for six weeks would clearly not qualify.
- 6.7 There are further continuity provisions which prevent Hirers ending an assignment and then within days renewing it.
- 6.8 The following breaks or gaps will not bring to an end the “relationship” for the purposes of “qualifying”:-
  - Breaks of 6 weeks or less.
  - Sickness or injury absences of less than 28 weeks.
  - Pregnancy and maternity leave.
  - Statutory or contractual time off (e.g. holidays).
  - Jury service of less than 28 weeks – Regulation 7 (8) and 7 (9).
- 6.9 Time spent working by the Agency Worker prior to 1<sup>st</sup> October 2011 does not count. – Regulation 7 (12).

## **7. Day One Rights**

- 7.1 From Day One Agency workers are entitled to access to collective facilities and amenities – Regulation 12.
- 7.2 These include:-
  - Canteen or other similar facilities
  - Child care facilities
  - Transport services
- 7.3 Hirers will be able to prevent access to such facilities if they can justify their objection on objective grounds. – Regulation 12 (2).

## **8. Rights to Access to Employment**

- 8.1 An Agency worker has the right to be informed by the Hirer of any relevant vacant posts and to have the same opportunity as a comparable employee or worker to find permanent employment. – Regulation 13 (1).
- 8.2 Information about any vacancies may be by way of general announcement e.g. intranet or notice board – Regulation 13 (4).

## **9. Liability of Temporary Work Agency and Hirer**

- 9.1 Hirers will be liable for any breach.
- 9.2 The Temporary Work Agency will not be liable if it can show it took reasonable steps to ensure the Hirer complied with its obligations under the Regulations. – Regulation 14 (1) (2) and (3).

## **10. Right to Receive Information**

- 10.1 Agency Workers may make a written request to the Temporary Work Agency for a written statement asking for details of any alleged breach of Regulation 5.
- 10.2 The Temporary Work Agency must respond in 28 days providing any relevant information to basic working and employment conditions.
- 10.3 If the Agency does not reply the Agency worker can then submit a written request to the Hirer.
- 10.4 The Hirer must then reply in 28 days.
- 10.5 Agency workers are also able to submit written requests (i.e. without going first through the Agency) and the Hirer must reply within 28 days to that request.
- 10.6 Employment Tribunals can draw adverse inferences from a failure to respond or adequately to respond to such requests. – Regulation 16.

## **11. Unfair Dismissals and The Right not to Suffer a Detriment**

- 11.1 Agency workers who are employees who are dismissed as a result of enforcing any of their rights under the Regulations shall be regarded as automatically dismissed.
- 11.2 Agency workers have the right not to be subjected to any detriment as a result of enforcing their rights under the Regulations.
- 11.3 It is a requirement that the Agency worker seeks to enforce their rights “in good faith”. – Regulation 17 (1) (2) (3) (4) and (5).

## **12. Claims to Employment Tribunals**

- 12.1 Claims must be brought within 3 months of the act complained of or the last of a series of acts complained of.
- 12.2 Claims may be allowed out of time if just and equitable to do so.
- 12.3 Tribunals shall, if it considers it just and equitable:-

- Make a declaration as to the rights of the Agency worker
- Order compensation which is just and equitable (there is no limit on the amount)
- Order the Hirer or Agency to take action to stop or reduce the adverse effect complained of.
- There will be no awards for injury to feelings

12.4 For any breach of Regulation 5 (equal treatment in respect of basic working and employment conditions) the award must not be less than two weeks pay. – Regulation 18.

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