

Agency Workers: 12 weeks to Equality

The agency workers directive has finally made its passage into UK law, coming into force as the agency workers regulations later this year. In this article, Jenny Wilson and Helen Connor from the employment law team at Pinsent Masons take a closer look at what impact the regulations will have.

Demand for temporary staff is reaching a two-year high just as the Agency Workers Regulations 2010 (the "Regulations") come into force on 1 October 2010. They are designed to give agency workers equal treatment to permanent employees with regards to pay and other basic working and employment conditions after 12 weeks of working in a given role. The Regulations also include provisions relating to access to facilities, vacancies and changes to information and consultation requirements.

This is significant progress for agency worker's rights but implementing the new Regulations will be a demanding task for employers, combining the additional cost with further administrative implications. Government is expected to publish its guidance on the Regulations in due course.

AGENCY WORKERS REGULATIONS— KEY PROVISIONS Q & A

Which types of workers will receive equal treatment with permanent employees?

Workers will receive equal treatment with permanent employees if they find work through an agency, whether they are employed by that agency or not. Self-



employed contractors are not covered by the Regulations; however, workers supplied by "umbrella" companies are.

How can an employer prove that the agency worker has received equal treatment in relation to basic working and employment conditions?

The agency worker must be treated as if he/she had been recruited directly to the job.

However an employer will be deemed to have provided equal treatment if they can point to a permanent employee with equivalent basic working and employment conditions.

What if other employees are paid more due to experience or level of qualifications?

Agency workers are entitled to the same treatment that they would have received had they been directly recruited as a permanent employee at the same time as they started their assignment, so any differences in pay or conditions which are due to these factors would not be unlawful.

How does the 12 week qualifying period work?

Agency workers are entitled to equal treatment after being in the same role for 12 continuous calendar weeks. Any week or part of a week during which the agency worker is on assignment with the employer counts towards the qualifying period.

Type of absence	Effect on 12 week qualifying period
Sickness absence	Pauses the clock for up to 28 weeks
Annual leave	Pauses the clock
Shut downs	Pauses the clock
Jury service	Pauses the clock for up to 28 weeks
Industrial action	Pauses the clock
Pregnancy and maternity-related absence	Clock keeps running
Maternity, paternity or adoption leave	Clock keeps running

Will employers be able to get around the 12 week qualifying period by deliberately moving agency workers into different roles e.g. every 11 weeks?

No, and if an employer wanted to start the 12 week period running again, the worker would have to start a new assignment. It would not be sufficient to give them slightly different duties or for them to have the same duties but work in a different department or for a new line manager. The Regulations include "anti-avoidance" provisions which stop employers from trying to get around the 12 week rule in this way. Employers may be fined up to £5,000 if they are caught doing this and it would also create bad publicity for the employer.

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What if an agency worker is absent from work during the 12 week qualifying period?

Whether or not an agency worker's absence from work counts towards the 12 week qualifying period depends on what type of absence it is. The table below summarises the effect of different types of absence:-

Will agency workers have a right of access to job vacancies?

Agency workers have the right of equal access to job vacancies and this occurs from the first day of employment, not after the 12 week qualifying period.

What about access to facilities?

The Regulations give agency workers the same access to collective facilities and amenities as permanent employees such as canteens, crèches, transport arrangements or gym access. This right also occurs from the first day of employment and the employer is responsible for ensuring this.

Who is responsible for ensuring that agency workers receive equal treatment?

Aside from access to facilities and details of vacancies, which will be the employer's responsibility, it is the agency's duty to ensure equal treatment. However, if the agency has taken reasonable steps to obtain information from the employer but has not received this information, then the employer may become liable for any inequality of treatment. It is therefore very important that the employer complies with its legal obligations.

What about trade union representatives- what is their role now?

Union representatives will have an important role working with both the agency and the

employer to ensure the Regulations are implemented correctly. Trade unions can have a constructive role in helping to facilitate the changes.

Is there a change to information and consultation rights?

The impact of the Regulations on existing employment law legislation has been little discussed to date. But after 1 October 2010 agency workers will have the same rights to information and consultation as permanent employees and will count towards the thresholds for representative bodies. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) information on agency workers will also have to be included as part of the requirement to provide employee liability information. It will be a key consideration for employers to ensure that they include agency workers when providing any information to or about the workforce.

POTENTIAL CONSIDERATIONS FOR EMPLOYERS

The government has estimated that after the introduction of the Regulations, the employment of each agency worker will require an additional one and a half hours of a HR manager's time. For example, to implement the wide definition of pay, which includes performance related pay, will require employers to assess and appraise agency workers, so that their pay will reflect their performance. This process will clearly require time set aside to complete. Equally, amongst the payments agency workers may or may not receive, when designing reward packages employers should be aware that agency workers are not entitled to receive benefits in kind, such as a company car or private medical insurance, but may receive vouchers of a fixed value, such as lunch vouchers. This ambiguity will make benefit provision more complicated for employers, such that they may end up including all agency workers in all staff benefits, or somewhat drastically, employers could decide to remove the facilities altogether.

Employers concerned about their ability to maintain flexibility following the recession may try to find ways to reduce the cost of the Regulations on their business. It will be tempting to ensure that agency workers never pass the 12 week threshold, which is

easier in theory than in practice, but employers must be aware of the consequences of trying to 'beat the system' including the £5,000 penalty and damaged trust among the workforce. Some employers may contemplate a change to direct recruitment or increase their use of self employed workers and managed service contracts or alternatively, if employers have sufficient purchasing power, they may negotiate exclusivity with agency suppliers to reduce the costs.

POSITIVE CHANGE FOR AGENCY WORKERS

Differences in terms and conditions between agency and permanent employees often caused a lack of unity within the workforce and meant employers could cherry pick employees to take advantage of the minimal agency worker rights. Permanent employees received many more benefits than temporary workers and tensions arose between the two workforces. The confusing triangular relationship between agency workers and employers has long been a disadvantage for agency workers. Despite the challenge for employers of adapting to the

Regulations, the benefits for agency workers and the advantages of a cohesive workforce should outweigh any initial inconvenience.

Trade Unions have fought hard to secure a fair deal for agency staff with the intention of ending the worst abuses. The Regulations are timely rules for unifying the workforce, particularly since the recession demonstrated that agency workers

are vulnerable to dismissal and poor treatment.

WHAT NEXT?

Government guidance is still anticipated and we await further direction on the Regulations. This could be a longer wait than expected given the recent change in government. Arguably the Regulations are a significant signal that the EU is moving away from an approach to labour markets based exclusively on flexibility, but the improvement in treatment of agency workers and the unity within the workforce will make any loss of flexibility worthwhile. The ambition for all workers to have equal employment rights is not a new one and the Regulations are the first step towards achieving this goal. Trade unions are focusing on fairness and flexibility, two principles which are becoming ever more important to a successful workforce and economy.

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Advice for the Coalition; staff need to be agents of change for better public services

£6.25 billion down – a drop in the ocean, we’re told, compared to the tsunami of cutbacks in public spending arising from the Coalition’s Budget and the expenditure review later in the year.

No-one doubts that the deficit needs reducing. But public servants also know that many existing services could be better designed and more effectively delivered, improving outcomes for clients and bringing substantial savings in train. By presenting the deficit reduction simply as painful but necessary financial cuts, the Coalition is missing the opportunity of making the case for fundamental service reform as an essential element in the spending reviews.

Cutbacks delivered with a ‘slash and burn’ approach must risk being a blunt instrument leading to real damage to the fabric of essential services. On the other hand, making the case for fundamental service redesign within strict financial parameters gives the initiative to service deliverers to make far-reaching improvements.

‘Cheaper but better’ is an aspiration that many staff would sign up to. Staff know where savings can be made, inefficiencies eliminated, outcomes improved. It will therefore be a tragedy if ineffective practices, waste and duplication are not tackled – but instead targets that are easier to identify, what ever their social value, are hit first.

The key will be where and how the decisions about what to stop doing, particularly at the coal face, are made. Will staff be engaged in planning and delivering changes and securing savings – or will a series of central and local dictats lead to panicked, unplanned measures? What are the criteria for services that need protecting and others that could be reduced or eliminated, against which decisions can be made? What are going to be the rules of the game? Or put it another way: what’s the big picture vision of post-deficit public services, so managers and staff alike have something positive to aim for.

With predicted job losses ranging from the thousands to the hundreds of thousands, levels of anxiety among public servants about their jobs and their futures are sky high – yet these are exactly the people who are going to have to carry the plans through.

One of the vital lessons the public sector should make

from the recession is the way that – faced in many cases with an equally sheer cliff edge – private companies worked with their staff to minimise the pain, while maintaining and improving product quality or customer service. As the CBI’s recent report states: ‘good communication and engagement with staff has been the key to making the workforce changes needed to safeguard jobs during the recession.’

Engagement to survive is what made this recession different – and that is exactly what the public sector now needs. Engagement means strong strategic leadership, managers with soft as well as process skills, effective employee voice and organisational integrity, putting into practice values such as trust, honesty, transparency and partnership ways of working.

The onus will be on managers to ensure that core and key skills are protected, that priorities for service delivery are arrived at fairly and transparently, that the views and contributions of staff are sought at every opportunity to redesign and re-engineer services. New ways of working, continuous improvement regimes, better sickness absence management, improved performance management, focussed training which up-skills and re-skills staff to deliver new priorities and ways of working will be more vital than ever – as will the crucial role of public sector HR and training professionals as a result. Effective industrial relations will be equally important, given the high level of unionisation in the public sector.

In our recent report on employee engagement, *Engaging for Success*, David MacLeod and I highlighted a series of case studies across central and local government, and the NHS, where profound changes in service delivery saved very large sums of money – and achieved better outcomes for patients, client groups and staff alike. All of these examples had real and sustained employee engagement at their heart, to design and deliver the changes, however difficult.

My message to the Coalition is simple: rather than casting public sector staff as the victims of change, destined simply for the dole queues, why not empower them as the agents of service improvement, and yes, of the necessary savings too.

Nita Clarke is director of the IPA



ACAS chair speaks to IPA AGM

Ed Sweeney warned that the private sector may not be yet in the clear as workforces begin to demand their 'deferred pay' following the recession. Speaking on the industrial relations landscape for 2010 at the IPA's AGM, Sweeney reported that ACAS was beginning to see signs that private sector workforces that had worked closely with employers during the recession, often accepted zero pay rises and reduced working hours, were now looking for improved rewards. Responding to Sweeney's comments, IPA

director Nita Clarke called on the Coalition government and public sector leaders to step up efforts to involve staff in redesigning services to save money and better meet citizen's needs. Top down approaches risked industrial action and disengaging workforces, she said. The event followed a roundtable seminar led by Ed Davis of Macquarie University, Mike Emmott of CIPD and trade union adviser John Lloyd, discussing the prospects for the public and private sector over the next 12 months, and the likely

impact of the new government on industrial relations. Davis opened the session with a comparative perspective from Australia, and in particular, the prospects for the labour movement. Participants discussed the ability of the labour movement to influence the political agenda, the challenges of establishing collective forms of voice and representation in the private sector and likely areas of labour market and employment law reform under the new government.

Budget reveals dramatic change for public services ahead

The Coalition government's emergency budget announced changes to taxes, welfare and departmental spending. The budget will have wide ranging implications for the workplace and workforce. Headline measures include:

Pay and taxes

- National Insurance threshold to rise from April 2011. Businesses outside the South-East to receive national insurance exemption for the first ten people they employ over the next three years
- Public sector pay freeze to be extended for a further year (two year total) for all employees earning above £21,000. Employees earning below this level will receive £250 extra per year
- VAT will be raised from 17.5 per cent to 20 per cent from January 2011

Pensions and retirement

- Government to review the default retirement age and will accelerate raising the state pension age to 66
- From 2011 the basic state pension will be linked to earnings
- Government will hold a brief review on pensions auto-enrolment

Welfare

- Parents to be forced to look for work once their child reaches five years of age, or lose income support. Parents on income support currently have to find work once their child reaches ten years of age
- Those on disability living allowance to undergo medical tests for eligibility every three years

Labour market experts warned that the budget did little to support growth and job creation to compensate for the job losses expected in the public sector.

General secretary of the TUC, Brendan Barber, called the budget "dangerous and divisive", he added; "This Budget was economically dangerous and socially divisive. The one thing we can now say is that we are very definitely not all in this together. Those on middle and low incomes have done worse than expected, and the rich have been let off much of what they feared.

"But we will all suffer from an economy that is now likely to be sluggish at best and with a double-dip recession at worst."



You can read more about the budget at http://www.hm-treasury.gov.uk/junebudget_documents.htm

