

Agency workers

Your rights as temporary agency staff



Overview

This factsheet will help you to understand your rights at work if you are an agency worker assigned to do temporary work through a temporary work agency, following the implementation of the Agency Workers Regulations 2010 (which we will refer to here as "the regulations"). As the law on this area is complex, this factsheet offers general guidance only. It is always worth seeking specialist legal advice about your own particular situation.

The definition of an agency worker

In order to be protected by the regulations you must be an "agency worker". This is an individual who has either a contract of employment with the agency or, more usually, a contract with the agency to perform work and services personally for the hirer (that is, the end user), under the hirer's supervision.

A temporary work agency supplies workers to hirers for temporary work. This is not the same as an agency that places people in permanent positions, whether directly or through an intermediary.

The regulations take a wide interpretation as to who is an agency worker. For example, you will have rights under the regulations even if you are supplied through one or more agencies to a hirer, or if you are paid by the agency through another company. If you are genuinely self employed you will not be covered by these regulations.

Day one rights

The regulations provide for various rights to be automatically conferred on all agency workers from the first day they start work with the hirer. There are two key "Day one" rights.

- An agency worker has the right to be treated no less favourably than a comparable employee in the

hirer's establishment in terms of their access to "collective facilities and amenities". This means that the agency worker should be given the same access to canteen, childcare, transport services or other similar facilities as any other employee.

- An agency worker must be given the same opportunity to be informed about job vacancies with the hirer as is given to the hirer's permanent employees.

12 week rights

After 12 continuous weeks of service with the same hirer an agency worker is entitled to equal treatment in respect of the same "basic working and employment conditions" to those which they would have been entitled had they been recruited directly by the hirer to do the same job as an employee or worker.

Basic working and employment conditions are defined in the regulations as being pay, duration of working time, night work, rest periods, rest breaks and annual leave. "Pay" is defined in the regulations and includes basic pay, some bonuses or commission for performance and holiday pay. Specifically excluded from the definition of "pay" are any payments which are not directly attributable to the amount or quality of the work done, as well

as other specific payments including sick pay, pension, maternity pay, and redundancy pay.

The 12 week qualifying period

An agency worker needs to have continuous employment with the same hirer for 12 weeks before the right to comparable basic terms and conditions applies. Continuity of employment will only be broken if:

- The agency worker starts a new assignment with a new hirer
- The agency worker starts a substantively different role with the same hirer
- There is a break of more than six calendar weeks between assignments with the same hirer.

There are specific rules to protect agency workers from their agencies or hirers trying to avoid the application of the 12 week qualifying period. Generally speaking in more instances than not continuity will be satisfied. For example, even if an agency worker is only on assignment with the same hirer for one day a week they will still accrue the right to equal treatment after 12 calendar weeks.

Comparator

For the purposes of bringing a claim under the agency workers regulations, a comparator is an

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actual colleague or employee, doing a similar job and having a similar level of work experience, who has been directly hired by the hirer.

Agency workers are entitled to the same terms and conditions that they would have received if they had been directly employed by the hirer. While an actual comparator is not necessary, if an agency worker can point to a comparator, this is one of the ways in which they can establish their right.

Pointing to an appropriate comparator is also one of the ways that an employer can defend a claim under the regulations. The regulations provide that an individual is a comparable worker in relation to an agency worker if both the individual and agency worker are:

- Working for and under the supervision and direction of the hirer;
- Engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification or skills;
- Working at the same establishment; and
- The individual is an employee or worker of the hirer.

Pregnancy and maternity

If an agency worker has commenced a role but is unable to continue for a pregnancy-related reason or because of the need to take maternity/paternity or adoption leave, the agency worker is deemed to be working during that period for the purpose of accruing continuous service. This could have an effect on the calculation of Statutory Maternity Pay, if as a result of attaining 12 weeks service the worker moves to a higher pay rate. However, she will not be entitled to Contractual Maternity Pay.

How to establish if your rights have been infringed

An agency worker may become aware through the course of their work what entitlements comparators in their workplace have, and that their rights have been infringed by either the agency or hirer.

It is recommended in the first instance that the agency worker should have an informal discussion on the matter with the agency or hirer to try to resolve the matter.

If this is not possible, an agency worker has the right to make a written request to the temporary working agency for a written statement containing the basic terms and conditions of employment of the hirer's directly engaged workers; and the factors taken into account when setting the agency worker's working and employment conditions.

They should also name any comparator that they rely on to show that the agency worker is being paid the right amount.

If the infringement relates to the provision of collective facilities and amenities or job vacancies, the written request should be sent to the hirer. A response must be provided, in either event, within 28 days.

Pursuing a complaint

There are a number of claims an agency worker can make in the event the regulations are breached. An agency worker has the right:

- Not to be subjected to a detriment, for making allegations, giving evidence, refusing to forgo a right, asserting rights, or bringing proceedings under, or in connection with, the regulations. Such a claim can be made at any time; the agency worker does not need to satisfy the 12 week qualifying period. This claim should be made against the

temporary work agency and/or hirer

- To make a claim for breach of the requirement of equal treatment. This claim can only be made after the 12 week qualifying period because this is when the agency worker actually obtains those rights. This claim should be made against the temporary work agency and/or hirer
- To make a claim against the hirer when they have not been given access to collective facilities and amenities and job vacancies. This claim should be made against the hirer.

An agency worker who is also an employee can make a claim for unfair dismissal if they are dismissed due to efforts to enforce these regulations. However, in the majority of cases agency workers will not be employees. Whether you are an employee or not can be a complex legal issue which needs to be addressed on a case by case basis. However, if you are not an employee, then termination of an engagement may well constitute a detriment if it can be shown that it was because you tried to enforce the provisions of the regulations in some way as set out above.

It is worth noting that normal unfair dismissal rights are not given to agency workers under these regulations. The regulations do not provide any extra protection in this regard to termination of engagements, other than as set out above. Please note that strict time limits apply in respect of bringing a claim. If such a claim arises it will need to be submitted in the Tribunal 3 months from the date of the breach and/or detriment and/or dismissal.

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim

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does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk.

In the event a claim is successful, a Tribunal has the ability to make a declaration, make a recommendation for action to be taken to remedy the failure or order a payment of compensation. There is no upper limit to the amount of compensation payable; however there is a minimum award of no less than two weeks salary. The amount of compensation will be what is "just and equitable" in the circumstances and it must bear relation to the actual financial loss suffered. There may also be some instances where an award towards injury to feelings will be made.

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