West Midlands Councils
Employer Services

WEST MIDLANDS COUNCILS

# HR Bulletin *E-Update 16 - May 2011*

**Agency Workers Regulations**

**As we get closer to the October implementation date for the Agency Workers Regulations and in light of the recent publication of Draft BIS Guidance, with final guidance expected as we write, it seemed timely to remind colleagues of the provisions of the Regulations. On a related theme, we also briefly cover a recent EAT decision with regard to liabilities upon employers for acts of discrimination within the workplace by agency workers.**

**Defining an Agency Worker**

The recent guidance defines such as being where a 'temporary work agency' (TWA) supplies workers to work temporarily for a third party (defined as the 'hirer'). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract (an employment contract or an agreement to provide services personally) with the TWA. Under the Regulations a TWA is a person in business, whether for profit or not and including both public and private sector bodies, involved in the supply of temporary agency workers. This could be a "high street" agency, but also an intermediary, such as a 'master vendor' or 'neutral vendor' if they are involved in the supply of the agency worker. Such arrangements exist where a hirer appoints an agency (the master vendor) to manage its recruitment process, using other recruitment agencies as necessary, OR appoints a management company (neutral vendor) which, similarly, normally does not supply workers directly but manages the overall recruitment process and supplies temporary agency workers through others.

The following types of temporary workers will be outside the scope of the Regulations;

- individuals who find work through a temporary work agency but are self employed (see note below);
- individuals supplied as contract labour, not working under the direction and supervision of the host organisation;
- individuals working for in-house temporary staffing banks;
- individuals on secondment or loan from one organisation to another

The guidance sets out the example characteristics of an agency worker as;

- an individual who works on a variety of different assignments, but is paid by the TWA who deducts tax and NICs;
- the worker has a contract with the TWA but works under the direction and supervision of a manager within the hirer;
- time sheets are given to the TWA who then pays the worker for the hours worked;
- If the worker is on sick leave, the TWA pays the SSP (subject to satisfying the criteria applicable to all workers), and;
- The TWA pays holiday pay when paid statutory leave is taken.

Note; the application of the Regulations to 'freelancers'(such as those sometimes defining themselves as consultants) engaged through a third party remains an area yet subject to scrutiny. In some circumstances, such workers will meet the 'direction and supervision' test, but it is likely that generally they will fail the primary test of being employed by the third party as a TWA. The more pertinent test will then need to examine the relationship between the 'consultant' and third party and whether an employment relationship can be found to exist.

No doubt, there will be attempts by unscrupulous organisations to subvert the rights contained within the Regulations, however, the guidance seeks to close off such by stating that putting earnings through a limited company would not in itself put individuals beyond the possible scope of the Regulations. Where a tripartite relationship remains and a hirer is not a client or customer of such individuals "they are likely to be in scope". If the arrangements do not reflect the reality of the relationship (e.g. despite the wording of a contract, the actual reality is that the individual is in not in business on their own account and they work under the supervision and direction of the hirer) or are an avoidance tactic, the Regulations will apply.

**The New Rights – A Reminder**

The Agency Workers Regulations 2010 (SI 2010/93) will come into force on 1 October 2011. The Regulations provide new entitlements for agency workers to certain rights from the first day of their assignment. These are defined as information on job vacancies, provided through normal mechanisms as to comparable permanent workers and employees (unless the vacancy is due to internal restructuring and covered by priority redeployment processes) and access to facilities such as a staff canteen, transport facilities, car parking and child-care facilities. This is not a right to special treatment, for example, if a crèche was full and there was a waiting list for employees this would also apply to the agency worker. The latest guidance specifies these rights do not extend to 'off-site facilities or benefits in kind' which are not provided by the hirer, such as subsidised access to an off-site gym.

Less favourable access to any of such 'facilities' must be subject to 'objective justification'. Essentially, hirers would have to ask themselves whether there is good reason for treating the agency worker less favourably and would doing so be necessary and proportionate to achieve a legitimate aim. The test of objective justification reflects that commonly used e.g. cost may be one factor to take into account but hirers are unlikely to be able to rely on cost alone to justify different treatment. Practical and organisational considerations could also be a factor.

**Pay and Working Conditions**

Following the completion of a 12-week qualifying period, agency workers will be entitled to the same basic working and employment conditions as a comparator working for the hirer. This covers pay, working time duration and contractual annual leave.

Pay is defined as basic pay plus other contractual entitlements that are directly linked to the work done by the agency worker whilst on assignment. For this purpose, the draft guidance states that 'pay' includes;

- basic pay based on the annual salary an agency worker would have received if recruited directly (including any 'starting position' and subsequent pay increments that would be due, or otherwise, to a comparable worker);
- overtime payments, subject to requirements regarding the number of qualifying hours;
- shift/unsocial hours allowances, risk payments for hazardous duties;
- payment for annual leave (above the statutory minimum of 5.6 weeks, at a full time equivalent rate) which can be added to the hourly or daily rate;
- bonuses or commission payments related to quality of personal performance;
- additional discretionary, non-contractual payments that are paid with such regularity that they have become custom and practice but which do not fit the excluded types of bonus (see below), and;
- benefits provided via vouchers which have monetary value and are not "salary sacrifice schemes" e.g. luncheon vouchers, child care vouchers

In addition to the statutory provisions of the Working Time Regulations an agency worker will be entitled to the same terms and conditions relating to the duration of working time, night work, rest periods and rest breaks and to be paid at the appropriate overtime rate as a comparable worker or employee.

Pay excludes occupational sick pay, pensions, maternity, paternity or adoption pay and of course, redundancy or notice pay. Also excluded are any bonuses (direct or indirect reward) which are not directly linked to the performance of the individual. Equal treatment does not change the employment status of temporary agency workers.

The Regulations do not to require full integration of agency workers into performance appraisal systems. However, (in the unlikely situation that any productivity related payments remain!) this does not mean that the same process for assessing performance needs to be followed i.e. it could be modified accordingly.

**Pregnancy and Maternity**

After completing a 12 week qualifying period in a given job, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes and will also need to be found alternative sources of work, paid at the same rate or higher than the original assignment, if they can no longer complete the duties of the original assignment for health and safety reasons. If alternative work cannot be found, then the pregnant woman will have the right to be paid by the agency for the remaining expected duration of the original assignment. The right to such paid time off will only arise if;

- a risk assessment indicates that the agency worker's current role is unsuitable for pregnant workers;
- no reasonable adjustments can be made to make the assignment suitable for the pregnant worker; and
- the temporary work agency cannot find a suitable alternative assignment either at that hirer or another hirer.

It is the responsibility of the agency worker to notify the agency of her pregnancy and also in writing to the hirer. The agency worker will not be eligible to be paid if they have unreasonably refused suitable alternative work.

The agency worker should inform the agency of any ante-natal appointments. After a 12 week qualifying period in a particular job, the agency will be required to pay an agency worker at the current hourly rate and for each hour that she misses of the assignment.

These provisions do not give the agency worker any additional entitlement to maternity, paternity or adoption rights beyond those to which they are already entitled nor is it a right to return to work after maternity leave.

The clock will continue to tick and the pregnant agency worker will continue to accrue weeks in relation to both the original hirer and the new hirer where she is working in another role.

**Calculating the 12 week qualifying period**

As many of the rights for agency workers will not be obtained until they have worked in the hirer for 12 weeks, local authorities will need to understand how this is calculated and have a mechanism in place to monitor periods of engagement. Key points are as follows;

- Qualification is triggered by working in the same job with the same hirer for 12 calendar weeks. A calendar week in this context will comprise any period of seven days starting with the first day of an assignment. Calendar weeks will be accrued regardless of how many hours the worker does on a weekly basis.
- Continuity will normally be broken by a break of six weeks between assignments in the same job, or when an agency worker takes up a 'new role' with the hirer where the "whole or main part of the duties in the new role are substantially different" to the old role.
- The 12 weeks qualifying period will not count any period of engagement before the Regulations come into force.
- A worker can qualify for equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one agency for part of that period of time.
- Breaks between assignments due to sickness, maternity, jury service, industrial action or pre-determined closure periods, such as school holidays, will not break the qualifying period.

There are also specific 'anti-avoidance' provisions in which agencies and hirers may be required to prove they were not seeking to abuse the qualifying period by, for example, rotating workers around different assignments. Agency workers have the right to bring a claim if assignments are structured so as to avoid the scope of the Regulations.

**Enforcing Rights**

Agency workers also have a right not to suffer a detriment for asserting rights under the Regulations. The Government decided against making TWA's and hirers jointly and severally liable for breaches, but a tribunal could decide to 'join' the hirer and, where appropriate, release an employment agency from a claim.

Nevertheless, the TWA will be primarily responsible for breach of the equal treatment principle. However, it will have a defence if it can show that it took "reasonable steps" to obtain relevant information from the hirer about its basic working and employment conditions. A hirer may be held responsible for a breach if a tribunal finds that they, for example, ignored the TWA's request to discuss and ensure compliance with the Regulations.

In all cases, in determining whether the principle of equal treatment has been breached it is important to ensure that the proper comparison is being made. For example, if an agency worker is hired to carry out a job on a part-time, fixed-term or flexible basis, they will be entitled to the relevant terms that would have applied had they been recruited directly to work on an equivalent part-time, fixed-term or flexible basis. In addition, the guidance states "In the event of a dispute, a hirer would have to demonstrate that it is a provision that they apply to directly recruited staff, for example, inventing an artificial 'starter grade', specifically to reduce the terms and conditions to which an agency worker would be entitled, would not be deemed compliant".

**Liability for Discriminatory Acts by Agency Workers**

**In the recent case of *Mahood v Irish Centre Housing Ltd,* (EAT 0228/10) the EAT held that an employer could in principle be liable for the discriminatory acts of an agency worker where that worker was exercising the authority of, or being controlled by, the employer, or where he or she has the employer's authority to do the acts in question where those acts are done in a discriminatory manner but are just as capable of being done in a lawful manner. Importantly, the EAT also reinforced that the employer would have a statutory defence subject to proving they took such steps as were reasonably practicable to prevent the agency worker from doing the acts in question.**

The former provisions of the Race Relations Act 1976 (S32) have now been consolidated within the Equality Act and provide that an employer could be held liable for the discriminatory conduct of "those who worked for him", whether or not it was done with the employer's knowledge or approval. This was subject to the statutory defence as set out above.

Mahood, an Irish protestant was employed by ICH Ltd in a temporary position subject to a CRB check. He worked alongside another temporary project worker hired through an employment agency. Mahood complained to his employer that the agency worker had made derogatory remarks about Irish and protestant people, mimicked his accent, and behaved in an aggressive and intimidating way towards him. The agency workers engagement was terminated. However, shortly after, Mahood's engagement was also terminated as his CRB clearance had still not been received and this significantly restricted his ability to work.

Mahood presented a number of claims before an employment tribunal including that ICH Ltd was vicariously liable for the actions of the agency worker. This was rejected by the Tribunal on the basis the employer had taken reasonable steps to prevent discriminatory acts.

Before the EAT, Mahood sought to distinguish his employers actions as being taken after the discriminatory acts rather than beforehand and as required in order to 'prevent' the employee from doing the act in question. ICH did not challenge this but that it could only be liable if the worker was its 'agent' or employee.

Whilst the EAT accepted that the tribunal's reasoning was inadequate under Tribunal Rules in that it had failed to adequately record the submissions of the parties and had misdirected itself on the statutory defence, it focused on the substance of the appeal. Interestingly, in light of the impending Agency Workers Regulations, the EAT described the status of agency workers in employment law as "still unclear", especially in relation to employment protection and discrimination.

Referring to the Court of Appeal decision in *Jones v Tower Boot Co Ltd*, [1997] IRLR 168 the EAT emphasised that the test for employers' secondary liability for discriminatory acts done by employees 'in the course of employment' was not the same as the common law test of vicarious liability, which fixed liability only for a wrongful act authorised by the employer or a wrongful mode of doing an act authorised by the employer.

Exploring previous decisions in cases outside the direct employment relationship, the EAT noted that a discriminatory act carried out by a person (the agency worker) without the knowledge or approval of a 'principal' (the 'hirer') could not be deemed to have been done by that person as the principal's agent, and with the principal's authority, where the principal had taken such steps as were reasonably practicable to prevent the person so acting. If it were otherwise, then a principal would incur greater liability for the acts of an 'agent' than for the acts of an employee.

On the established facts, the EAT was clear the individual responsible for the offending acts was not an employee of ICH. Therefore, if a tribunal were to find the employer liable for the discriminatory acts of an agency worker, then it would need to give a careful explanation of the facts giving rise to the conclusion that the agency worker was acting either as an employee or an 'agent' of the employer within the meaning of the legislation.

On the question of whether the agency worker was acting as ICH's 'agent', the EAT observed it was required to give a purposive construction to discrimination legislation. It held, therefore, that an employer could be liable for the acts of an agency worker exercising the authority of, or controlled by, the employer, where those acts were done in a discriminatory manner, but were just as capable of being done in a lawful manner.

Whether the employer would be liable would depend on a considered analysis of the authority afforded to the agency worker and what he actually did. However if the point was argued, and following a purposive construction as required by *Tower v Boot*, the EAT concluded they would have found the respondent liable. The case was referred back to the Tribunal to consider and conclude whether ICH could make out the statutory defence.

This decision both clarifies the potential liabilities facing an employer and is significant in that it confirms that the statutory defence applied in the context of a principal's (i.e. the employer's) secondary liability for acts of its 'agent', irrespective of the provision being expressly limited to acts of an 'employee'. In that context, one can conclude that it reinforces the 'equal treatment' principle underpinning the new Regulations, albeit from a different perspective.

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## Employer Services Team is here to help

***For advice and information on employment issues (including on any of the contents of this Bulletin) and consultancy support contact:***

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