

# factsheet

## INTRODUCTION

On 1<sup>st</sup> October 2011 the Agency Workers Regulations will come into force. The regulations have been introduced to implement the EU Agency Workers Directive issued in 2008.

The main purpose of the Agency Worker Directive (AWD) and the UK regulations is to allow qualifying agency workers the right to equal treatment with regard to basic terms and conditions of employment. The directive says that qualifying agency workers should be treated no less favourably than if they had been employed directly by an organisation. If the regulations are breached workers are eligible to take cases to Employment Tribunal.

This is important because:

- UNISON recruits and represents agency workers. Therefore it we need to be aware of the rights enjoyed by agency workers so we can organise them effectively.
- Employers are using agency workers to fill posts that should be filled by permanent employees. Consultation rights in the new Regulations give UNISON the right to be informed about the deployment of agency workers. We should be using this opportunity to negotiate with employers over the use of agency workers."

The regulations cover such issues as:

- Pay
- Paid annual leave
- Rest breaks and limits on working time
- The National Minimum Wage
- No unlawful deductions from wages
- Discrimination rights under the Equality Act 2010
- Health and safety at work

This factsheet give details of the regulations and offers advice for branch actions arising from their introduction. Full and detailed bargaining advice has been developed in cooperation with the TUC. This can be viewed here: <http://www.tuc.org.uk/workplace/tuc-20147-f0.cfm>

## DEVOLUTION

The Agency Workers Directive will come into force across the whole of the UK. Regulations implementing the directive will come into force in England, Scotland and Wales on 1st October 2011 under the Agency Workers Regulations 2011. The Agency Workers (Northern Ireland) Regulations 2011 will come into force slightly later, on 1<sup>st</sup> December 2011.

## UNISON AND AGENCY WORKERS

---

UNISON has always taken a lead in promoting equality in the workplace. A crucial part of this work is organising to ensure that people working in the same roles, alongside one another, are given the same rewards for doing the same work. That includes campaigning to make sure workers employed by agencies are employed on an equal basis to directly employed workers. Clearly, this also means working to stop employers using employment agencies as a “cheap labour” alternative to employing workers on permanent contracts.

The Directive and the UK regulations are the result of a long, hard campaign by trade unions across Europe to prevent the exploitation of agency workers.

In 2009 Dave Prentis, UNISON General Secretary, said: “The Agency Workers’ Directive is a crucial step forward in protecting agency workers, something UNISON has long been fighting for. We have all heard the horror stories of unscrupulous employers exploiting vulnerable workers on agency contracts. It is only right that we consign these horror stories to the history books.”

The UK regulations do not contain all of the safeguards that UNISON would like to have seen included. However, the introduction of these regulations is a significant development which should be welcomed by all those who want to promote equality and fairness in the workplace.

## WHO IS COVERED?

---

‘Temporary agency workers’ and ‘temporary work agencies’ are both covered by the Agency Worker Regulations.

Broadly the regulations define a “temporary work agency” as an organisation that is in the business of supplying workers to work temporarily for hirers. This is not to be confused with companies that outsource their work to private companies as this will fall outside of the scope of the Regulations.

A “temporary agency worker” needs to have worked in the same job with the same hirer for a qualifying period of 12 weeks for the regulations to apply. The qualifying period is not retrospective and will begin on or after 1<sup>st</sup> October 2011 (when the regulations come into force).

### **Who is exempt from the Regulations?**

Only the self-employed and outsourced arrangements to private companies fall outside the scope of these regulations. Workers out-sourced to another organisation are not defined as agency workers and their new employer is not a “temporary work agency” or a hirer of agency workers.

If a worker is employed by an ‘umbrella company’ or intermediary they may still be covered by the regulations. This is because the umbrella company was still involved with the supply of workers to hirers and therefore would fall into the definition of a ‘temporary work agency’.

If the agency member of staff has an employment contract as an employee of the agency rather than a worker then they make exempt from the regulations providing certain criteria are met such as being contractually entitled to a minimum level of pay between assignments (as well as benefiting from other statutory rights as an employee). This contract

arrangement typically only effects a small minority of agency workers who have skills that are in high demand, who they want to keep and who they have a long term client who uses them continuously.

## THE SCOPE OF “EQUAL TREATMENT”

---

Under the terms of the Regulations, temporary agency workers are entitled, after a qualifying period of 12 weeks, to equal basic terms and conditions of employment. The principle of ‘basic terms and conditions’ apply to conditions related to working time, holiday entitlement and pay (with some exceptions).

Equal treatment extends to:

- Pay
- Night work
- Rest periods
- The duration of working time
- Rest breaks
- Annual leave
- A pregnant agency worker is entitled to paid time off for ante natal appointments, provided they have completed the 12 calendar week qualifying period.

### Equal treatment in terms of pay

The Regulations stipulate that equal treatment on pay relates to “...any sums payable to a worker of the hirer in connection with the worker’s employment, including any fee, bonus, commission, holiday pay or other emolument, whether payable under the contract or otherwise.”

However, some forms of pay fall outside the scope of the regulations, these include:

- Occupational sick pay
- Any payment related to a pension or compensation for loss of office
- Maternity or paternity pay
- Redundancy pay
- Any payment made under a ‘financial participation scheme’
- Any payment for time off work made in accordance with certain statutory rights
- Guaranteed pay under the Employments Rights Act 1996
- Any payment by way of an advance under a loan agreement
- Any payment in respect of expenses
- Any bonus or incentive payment

It is important to note that the Regulations exclude ‘non-cash rewards’ – for example if an organisation offers its staff a private medical insurance scheme, agency workers would not be entitled to this benefit. The only exception where an agency worker is entitled to equal treatment is in regards to vouchers or stamps that have a fixed value.

## “DAY ONE” ENTITLEMENTS

---

The regulations require the hiring organisation to ensure certain minimum requirements from day one of their assignment. For example, they should be “no less favourably” treated in relation to access to collective facilities and amenities. This applies to facilities such as:

- The crèche
- The canteen
- Staff common room
- Toilets/shower facilities
- Transport services
- The prayer room

From day one of their assignment agency workers should also be given information about any relevant job vacancies within the hiring organisation in the same way as non-agency workers. The employer can choose how to advertise the vacancies, but the agency worker should know where and how to find the information.

## THE “SWEDISH DEROGATION”

---

Agency workers who have a permanent contract of employment with an agency and are paid between assignments will not have a right to equal pay. This is the case even where the agency worker has worked for 12 weeks in the same role with the same hirer. This exemption is sometimes referred to as the “Swedish derogation”.

For the exemption to apply, all of the following conditions must be met:

1. The agency worker must be an ‘employee’ of the agency
2. The exemption will only apply where an agency employs an agency worker on a contract of employment
3. The exemption will not apply if an agency worker is given a ‘zero hours contract’ or their contract states that the agency is not required to look for or to offer the individual work.
4. The contract of employment must be ‘permanent’. The agency worker cannot be employed on a fixed term contract.
5. The contract of employment must include certain terms and conditions including minimum rates of pay and the location of work. See [TUC guidance](#) for the full list.
6. The contract between the agency and the individual must be agreed before the start of the first assignment and must be in writing
7. The agency worker must be guaranteed at least one hour off work a week
8. The contract must include a statement that by entering into the contract the agency worker will not have any entitlement, for the duration of the contract, to rights conferred by Regulation 5 of the AVR as far as they relate to pay.
9. The agency must try to find work for the agency worker
10. The agency worker must be paid at least 50% of the pay they received during the previous assignment between assignments.

Under the Swedish Derogation all fair treatment rights on conditions (annual leave, breaks, shift patterns etc) still apply, with the exception of pay.

## AGENCY WORKER INFORMATION

---

Under the regulations trade unions are entitled to receive information on the deployment of agency workers, including roles and locations from employers, for collective bargaining purposes. This right can be enforced through complaints to the Central Arbitration Committee (CAC).

In addition, employers now need to disclose agency worker deployment during statutory consultations under TUPE and Collective Redundancy regulations. If this is not done after a request Branches and members need to contact their regional officer and seek legal advice as it may be possible to take a case to an Employment Tribunal for protective awards.

## BRANCH ACTION

---

### Educate

Unfortunately, unequal treatment is deeply ingrained in many workplaces (and wider society) and passing a law won't create change by itself. Agreeing a policy, publicising the new rights and a strong lead from UNISON are needed to give members the encouragement to speak out where they see abuses occur.

Employers have a big role to play. Senior managers should be seen to support equal terms and conditions for agency workers. Managers should be trained to ensure they know the details of the regulations and how to work in a non-discriminatory way. Branches should also take steps to ensure all staff have been informed of the Regulations.

Stewards and reps should be aware of managers seeking to avoid the new regulations. One particular danger is that managers will cease to employ agency workers as they approach the 12 week qualifying period of employment simply because they will qualify for equal treatment. There are anti-avoidance measures in the Regulations and recourse to Tribunal if breached. See the point 4 below in the "negotiate" section for more information.

### Organise

New legislation is an opportunity to show workers what UNISON is doing on their behalf, and to involve members in UNISON's work. Agency workers are specifically affected by these regulations as a group, so get them involved by campaigning around respect at work or low pay.

Go out and talk to agency workers employed at your workplace about the regulations and their concerns about their working conditions. Recruiting agency workers to the union is hugely important in ensuring that their voice is heard in representations to management.

### Negotiate

A good collective agreement on the Agency Workers Directive, properly implemented, will not only defend workers rights but also pre-empt many claims – reducing stewards' caseloads and the chance that an employer will be taken to an Employment Tribunal. Try to negotiate with your employer on the following issues:

1. The regulations are a statutory minimum requirement for the equal treatment of agency workers. Agency workers should be given full, equal treatment on the same

Bargaining Support Group e-mail: [bsg@unison.co.uk](mailto:bsg@unison.co.uk)

terms as other workers from day one of their employment. Many employers already do this.

2. Write to your employer asking for the regular disclosure of agency work deployment as part of information provided for collective bargaining
3. Ensure the employer is “agency worker compliant.” Do they have systems in place to monitor the periods of work undertaken by agency workers and to identify when they qualify for equal treatment? Are they in a position to respond to statutory information requests from agency workers?
4. Seek a guarantee that there will be no avoidance of the regulations. Managers must not end the employment of agency workers in order to avoid the 12 week qualification deadline. Warn them there are anti-avoidance regulations that could risk a Tribunal case if breached.
5. Ensure that making minor changes to the responsibilities of agency workers will not “zero the clock” on their qualifying period.
6. Some local authorities and NHS Trusts have set up “in-house” employment agencies. These may become more common as a result of the agency workers regulations. Administering their own in-house “bank” of temporary staff may be more attractive to employers who would otherwise approach external employment agencies. If this is the case for the employer you are dealing with, negotiate for staff employed by the in-house agency to be given equal treatment from day one of their employment.

## MORE INFORMATION

---

Comprehensive guidance on agency worker regulations from the TUC: “Delivering Equal Treatment for Agency Workers, A TUC Bargaining Guide.

<http://www.tuc.org.uk/workplace/tuc-20147-f0.cfm>

In 2007 the TUC published a report by the Commission on Vulnerable Employment called ‘Hidden Work, Hidden Lives’. The report highlights case studies of employees in different types of employment and details their experiences of agency, low paid and insecure work. To read the report click on the link below:

<http://www.vulnerableworkers.org.uk/cove-report/full-report/>

More information on the Agency Workers Directive and the full scope of the regulations is covered in the Department of Business, Innovation and Skills guidance:

<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance.pdf>

UNISON’s ‘Hidden Workforce’ page: <http://www.unison.org.uk/hiddenworkforce/>

UNISON’s migrant workers page: <http://www.unison.org.uk/migrantworkers/>