

Client Alert

Latham & Watkins
Tax Department

Equal Rights for Agency Workers in the UK

From 1 October 2011 new regulations will come into force in the UK providing parity for agency workers with directly-engaged workers (usually employees) of the hirer (i.e. the entity that receives the services of the agency worker) regarding pay, working time, vacation and overtime. For those hirers to whom the Agency Workers Regulations 2010 (the "Regulations") apply, this could mean considerably increased costs, as well as the administrative burden of monitoring agency workers' service and of considering whether the work of the agency worker is comparable to work of individuals the hirer directly engages.

When do the Regulations apply?

The Regulations apply when one organization supplies labor to another organization in return for a fee based on the work performed by the agency worker for the "hirer". A typical example is an agency which supplies individuals to retailers during the holiday period to cope with seasonal shopping surges. The Regulations do not apply to organizations such as recruitment agents who provide an introductory service by matching job applicants to job vacancies.

The Regulations apply where:

- **The agency is engaged in the economic activity of supplying workers for temporary assignments (whether or not for profit), i.e. the agency supplies labor rather than an end product.**

The Regulations would not apply, for example, to an architect who sub-contracts the task of building a wall to a building company. In this example, the supply is the wall, not the labor of the brick layers.

- **The workers supplied are under the supervision and direction of the end user.**

The Regulations do not apply where, for example, a consultancy firm introduces a firm of I.T. specialists to a business to audit the business's I.T. systems. In this case, the individuals performing the services will have a large degree of expert knowledge and independence in conducting that audit, and so will not be under the supervision and direction of the business being audited.

- **The workers must have a contract of employment with, or a contract to perform work and services personally for, the agency.**

The Regulations do not apply where the agency is in fact a client of the individual worker.

"The Regulations are likely to have a significant impact on certain UK employers, such as retailers, banks, manufacturers and others who engage agency workers on a regular basis".

The Regulations are not intended to apply to genuine secondment arrangements, or to managed service contracts where the hirer does not supervise those working on the services. However, the Regulations include wide anti-avoidance powers, and UK employment tribunals are likely to scrutinize any such arrangements carefully, and issue penalties for anti-avoidance when they consider it appropriate to do so (these anti-avoidance powers are described in more detail below).

Equal Rights

The Regulations afford agency workers two categories of equal treatment rights:

1. Those that apply from the first day they are placed with the hirer ("Day 1 Rights"); and
2. Those that apply after they have accrued 12 weeks' continuous service with the hirer ("Week 12 Rights").

Day 1 Rights

From the first day of an agency worker's assignment to the hirer, the hirer must provide the agency worker with (i) access to on-site collective facilities and amenities, and (ii) information about all relevant vacancies in the hirer's organization.

In the example of an office with a discounted on-site staff canteen, agency workers are entitled to access the canteen and to purchase meals, but the Regulations do not entitle them to the discount provided to office employees. Similarly, if a company has an on-site gym, agency workers must be given access to it. If the company pays for its employees to use the gym next door, the company is not obliged to pay for its agency workers to use the gym as the gym is not an on-site amenity.

Week 12 Rights

If an agency worker has worked for the same hirer for 12 calendar weeks, the agency worker qualifies for equal treatment with individuals directly hired by the hirer as regards pay, duration of

working time, vacation and overtime. Some breaks within the 12-week period restart the clock for the accrual of these rights, e.g. if the worker moves to a substantively different role within the hirer's organization, or the worker is supplied to a different hirer. Other breaks merely suspend the clock, including any break shorter than six weeks and any planned shutdowns of the hirer's workplace, e.g. over the holiday season. The clock will continue to run during breaks for maternity, adoption or paternity leave.

An agency worker who accrues the requisite 12 weeks' service may claim equal pay with a comparable individual who was directly hired by the hirer. For example, a retail assistant supplied by an agency for 14 continuous weeks may claim the same hourly rate of pay as a retail assistant employed by the hirer, but that right to equal pay only applies once that 12-week threshold has been passed. Note that the 12 week period applies to the agency worker working for the hirer, regardless of what agency supplied the worker. If the agency worker is supplied to the hirer for 6 weeks by one agency and for the following 6 weeks by another agency, the agency worker will then have accrued the necessary 12 weeks service. The definition of "pay" in the Regulations is wide, and includes bonuses that relate to performance or quality of work. These Week 12 Rights are enforceable by workers against the agency, not the hirer, and so agencies are likely to contractually oblige hirers to monitor the periods for which individuals are placed within their organizations, regardless of whether those individuals were supplied by that particular agency for the whole period of their work for the hirer. This also means that fees charged by agencies may increase to cover the risks to them of claims under the Regulations and agencies are likely to require hirers to indemnify them for any risk.

In order to aid agency workers in enforcing these rights, the Regulations impose obligations on both the agency and the hirer to supply information

to the agency worker regarding pay, working time, etc., of directly-hired workers in the hirer's organization whose work is comparable to that performed by the agency worker, but these only apply if the agency worker requests it.

Anti-avoidance

The Regulations contain considerable anti-avoidance measures to dissuade hirers from structuring assignments in ways designed to deprive agency workers of their rights, e.g. by artificially rotating them between jobs. If an agency worker is hired for 11 weeks by the hirer, hired again after a seven-week break and then, after another seven-week pause, hired for a third time, this could be regarded as an attempt to avoid equal treatment. Additional awards of compensation of up to £5,000 can be awarded where there has been an orchestrated avoidance of Week 12 Rights.

Exemption from requirement to provide equal pay

There is an exemption to the requirement to provide agency workers with equal pay, known as the 'Swedish Derogation', if a number of conditions are met:

- The agency worker has a permanent contract of employment with the agency and is paid by the agency between assignments;
- The agency pays the agency worker for at least four weeks of any gap between assignments and at a rate of at least 50 per cent of the highest level of pay the agency worker has received during the last 12 weeks of the previous assignment (and no less than national minimum wage);
- The contract between the agency worker and the agency cannot be for 'zero hours';
- The agency takes reasonable steps to seek suitable work for the agency worker;

- If a suitable assignment is available, the agency worker must be given the option to be considered for it; and
- The agency worker must be informed in writing by the agency that the equal pay provisions of the Regulations will not apply.

Even if the Swedish Derogation applies, the agency worker will still be entitled to all Day 1 Rights and all Week 12 Rights other than the right to equal pay.

The Swedish Derogation could be of particular value in the context of those working on outsourced services. Whether the Regulations apply to such individuals will be a question of fact in each case, and will require a consideration of whether the conditions set out in the "When do the Regulations apply?" section above are satisfied. If the Regulations are applicable, the Swedish Derogation would be one way to avoid the agency being required to pay those working on the outsourced services at the same rate as those directly hired by the service recipient (however, the other rights will still apply).

Liability

The hirer is liable for breaches of Day 1 Rights, and it has a defence if it can show that the difference in treatment was objectively justified. The agency is liable for breaches of Week 12 Rights, and it may defend this by challenging whether the directly engaged worker chosen as a comparator by the agency worker is actually doing comparable work; or by showing that it took "reasonable steps" to obtain relevant information from the hirer about employment terms ordinarily included for the hirer's comparable, directly-engaged workers. In the latter case, the liability would then shift to the hirer.

Where Week 12 Rights have been breached, agency workers can choose to bring claims for damages in the employment tribunal against either their agency or the hirer, because they will not know whether the liability for

these Week 12 Rights has shifted. In determining any award, the tribunal will consider matters such as the seriousness of the breach and any financial loss caused to the agency worker. Besides awarding compensation, the tribunal can also make declarations or recommendations for action to be taken.

What should organisations be doing now?

The Regulations are likely to have a significant impact on certain UK employers, such as retailers, banks, manufacturers and others who engage agency workers on a regular basis. The key considerations for hirers and agencies will be the contractual provisions between them for (i) allocating the risk and cost of claims, (ii) designating responsibility for monitoring the periods of work, and (iii) sharing information about the rights of comparable directly-hired employees.

Employers can explore a number of options to minimize the impact that the Regulations will have on their businesses. We recommend that you:

- Review your existing contracts with agencies, so as to ensure you have appropriate information to enable you to monitor your compliance with the Regulations and that the contract appropriately allocates the risks posed by the Regulations between you and the agency
- Put systems in place to monitor the periods of time that each agency worker is engaged in your business;
- Consider hiring temporary workers directly, rather than through an agency
- Consider introducing qualifying periods for benefits for new recruits, i.e., a lower pay rate during a probationary period, being mindful of the UK age discrimination regime
- Audit your employment benefits and consider whether they relate to output or length of service, whether they could be regarded as Day 1 Rights or Week 12 Rights, and how the Regulations would apply to them

Please contact the authors of this *Client Alert*, or your usual Latham & Watkins contacts, for further advice.

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