

AGENCY WORKER REGULATIONS 2010

BRIEFING NOTE

SUMMARY OF CHANGES AND TIMESCALES

The Agency Worker Regulations 2010 come into force on 1 October 2011 giving agency workers the entitlement to the same basic employment and working conditions as if they had been recruited directly, if and when they complete a qualifying period of 12 weeks in the same job. They are entitled to equal treatment across a range of employment terms but their status does not convert from agency worker to council employee.

It is not retrospective for those agency workers already working with the council, the 12 week qualifying period will start from 1 October 2011.

From 1 October 2011, agency workers will also be entitled to access to collective facilities and information on job vacancies from day 1 of working for the council.

AGENCY WORKERS

The regulations apply to “agency workers” as defined. Workers hired on a temporary basis from an employment agency to work under the council’s supervision and direction are covered. These will be the most common type for the council.

Workers who are genuinely self-employed are not covered. Individuals working in the council's premises as a permanent or fixed-term employee of an outside contractor are not covered. Council employees who do other work through an in-house staffing bank are not covered.

NEW ENTITLEMENTS

Day 1 Rights for All agency Workers:

As soon as an agency worker starts in a council role, the council is responsible for providing equal treatment for specified day 1 entitlements and is liable for any breach of this obligation.

Facilities

The council must ensure that all agency workers have access to our collective facilities from the first day of working with the council. These may include:

- Car parking facilities
- Toilets/shower facilities
- Transport services (eg local pick up and drop offs, transport between sites)
- Canteen or other similar facilities
- Staff rooms

These entitlements do not apply to pay, or to employee benefits or perks.

Services hiring agency workers will have to consider how they can make arrangements to ensure that agency workers are aware of and have access to such facilities from day one eg organising parking passes etc. The council will have to make this information available to an agency worker as part of an induction process.

Job Vacancies

The council must ensure that all agency workers have access to information on job vacancies from the first day of working with the council in the same way as do council employees.

Access to information is widely available to all through council bulletins posted on notice boards and jobs online. **Services will have to make that information available to agency workers as part of an induction process. The Recruitment Team must be advised that, with effect from 1 October 2011, agency workers will be eligible to apply for internal vacancies.**

If there is a restriction on the advertising of posts to council employees then that also applies to agency workers, since their right is to equal treatment, not to better treatment. This right does not apply where posts are ring fenced for redeployment purposes or internal moves which are a matter of restructuring and redeploying existing internal staff under workforce management procedures in order to prevent a redundancy situation.

After 12 weeks in the same job:

The equal treatment entitlements relate to pay and other basic working conditions and come into effect after an agency worker completes a **12 week qualifying period** in the **same job** with the council. They are:

- Key elements of pay (including basic pay, overtime payments, shift/unsocial hours allowances, payment for annual leave, vouchers or stamps which have monetary value eg child care vouchers)
- Duration of working time eg if working is limited to a maximum of 48 hours a week
- Night work
- Rest periods
- Rest breaks
- Annual leave

In addition, pregnant agency workers who have completed the 12 week qualifying period, will be entitled to paid time off for ante natal appointments.

The right in relation to pay does not include things like sick pay, pensions, redundancy payments, maternity pay, adoption pay and paternity pay.

Any employment rights requiring a period of service before the right arises (for example, the additional period of annual leave after five years service) will be calculated from the date the qualifying period began eg an entitlement that requires 12 months service would require the agency worker to have 12 months service, not 12 months and 12 weeks.

CALCULATING THE 12 WEEK QUALIFYING PERIOD

The 12 week qualifying period would be triggered by working in the same job for the council for 12 weeks. A calendar week is any period of seven days starting with the first day of work. Calendar weeks will be accrued regardless of how many hours the worker does on a weekly basis – all that is required is that the individual works in a placement with the council at some point in the week in question.

For agency workers already working with the council and in post on 1 October 2011 the date for accrual of the 12 week qualifying period will begin on 1 October 2011 – any time worked in the council before that date is disregarded.

The council should be aware that anti-avoidance provisions are in place, which prevent the council from using the same agency worker on a series of assignments which are structured so as to prevent the worker from completing the qualifying period. A tribunal can impose a punitive award of damages if it decides that an employer has taken deliberate action to try to avoid the effect of the regulations.

The 12 week qualifying period will be broken if:

- the agency worker begins a new assignment with a new hirer
- the agency worker remains with the council but is no longer in the same role (for the qualifying period to be broken the work or duties which make up the whole or main part of a role must be substantially different and the council must notify the agency in writing)
- there is a break between assignments with the council of more than 6 weeks

The 12 week qualifying period will be 'paused'(continue to accrue on the workers return to the same post) if:

- for any reason there is a break of no more than six calendar weeks and the agency worker returns to the same role with the council
- there is a break of up to 28 weeks because the agency worker is incapable of work because of sickness or injury
- the agency worker takes leave to which they are entitled, including annual leave
- there is a break of up to 28 weeks because the agency worker is performing jury duty
- there is a break caused by a regular and planned shutdown of the workplace by the council
- there is a break caused by strike, lock out or other industrial action at a council establishment

The 12 week qualifying period will continue to accrue during:

- breaks due to pregnancy, childbirth or maternity which take place during pregnancy and up to 26 weeks after childbirth (case law indicates, that it may be discrimination in certain circumstances where a company fails to allow an agency worker to return

to the temporary post which she had previously occupied, following absence due to maternity)

- any breaks due to the worker taking maternity leave, adoption leave or paternity leave.

In each of these cases the 12 week qualifying period will continue to accrue for the originally intended duration of the assignment or the likely duration of the assignment (whichever is longer).

ESTABLISHMENT OF EQUAL TREATMENT

Deciding on what equal treatment means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been **recruited directly** to the same job.

For equal treatment on pay, each element of the pay package has to be looked at and compared individually – the council is not able to look at the overall package and decide that a deficit in one element is balanced out by some better treatment in another.

INFORMATION TO BE PROVIDED TO THE AGENCY

The following information must be provided to the agency before an agency worker can be supplied:

- the council's business and location
- start date and duration of assignment
- job role, responsibilities and hours
- the experience, training, qualifications and any authorisation which the council considers are necessary, or which are required by law, or by any professional body in order to work in the position
- any risks to health or safety known to the council and what steps the council has taken to prevent or control such risk
- any expenses payable by or to the agency worker

In addition the following information must be provided to the agency promptly if and when an agency worker completes 12 weeks in the same role:

- the level of basic pay (based on the annual salary an agency worker would have received if recruited directly), if and when there are overtime payments and shift/unsocial hours allowances or risk payments for hazardous duties
- types of bonus schemes the council operates (and how individual performance is appraised and information on annual pay increments)
- if the council offer any vouchers which have monetary value
- annual leave entitlement

EXEMPTIONS TO THE REGULATIONS

There is an exemption from equal treatment provisions on pay (and holiday pay) where an agency can offer an agency worker a permanent contract of employment and pay the agency worker between assignments. This means that after 12 weeks in a given job, the agency worker will not be entitled to the same pay as if they had been recruited directly.

All agency workers, including those covered by this pay between assignments exemption, are entitled to other new provisions under the regulations – in particular equal treatment in relation to the duration of working time, night work, rest periods and rest breaks and annual leave after 12 weeks (in these circumstances the entitlement is to time off rather than pay – the paid annual leave entitlement will be as set out in the contract of employment between the agency and agency worker).

Additionally, all agency workers must receive day 1 entitlements as these rights apply regardless of pay between assignment contracts.

INFRINGEMENT OF ENTITLEMENTS

If an agency worker believes their entitlements under the Regulations have been infringed they are entitled to request information relating to such.

If it is in relation to day 1 entitlements the requirement to provide information lies with the council and information can be requested any time after the start of the assignment. The agency worker should approach the council with a written request for information before making a claim. The council has 28 days to respond in writing from receipt of the request.

If it is about entitlements after the 12 week qualifying period then the requirement to provide information lies with the agency and the agency worker can only request information after the 12 weeks have elapsed. In this instance the agency worker can request a written statement from the agency about any aspect of equal treatment before making a claim. The agency has 28 days from receipt of the request to respond in writing. If an agency worker has not received a written statement within 30 days of making that request, the agency worker can then write to the council requesting the same information.

If an agency worker is unsatisfied with the response or does not receive a response they can bring a claim to an Employment Tribunal in relation to their rights under the Regulations.