



Agency Workers Regulation Toolkit

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Disclaimer

The AWR Toolkit has been prepared for general guide purposes only and should not be relied upon for any other purpose. It should not, under any circumstances, be construed as legal advice.

Thank You

We would like to take this opportunity to thank Brabners Chaffe Street LLP, Employment Department, for assisting us with the compilation of this guide.

Introduction



The Agency Workers Regulations 2010 (AWR) will come into force on 1st October 2011, cementing one of the biggest legislative changes in the recruitment industry's history. Many leading industry bodies have been working closely with policy makers over the past few years to ensure that the new regulations, which will bring the UK in line with European law, can be implemented without losing the UK's successful temporary worker model and its unique flexibility.

The new regulations mean that temporary workers will now be entitled to equal treatment in respect of basic working and employment conditions following the completion of a 12 week qualifying period. As with any new legislation, the regulations are not always as straightforward as they may initially seem and that is why we have hosted a number of AWR seminars and prepared this guide for our clients. We want to ensure that our customers have as much information as possible and that they are prepared for the implementation of the AWR. I must stress that this guide is a summary of our views on the AWR and has been produced to enable our clients to assess the need to take further advice on the AWR. This guide should not be construed as legal advice.

I would encourage all recruitment businesses to utilise the AWR preparation tools on offer and to seek advice wherever possible. Our experienced client managers are on hand to help with any questions that you may have regarding the AWR and finance (although this similarly should not be construed as legal advice), and they can also recommend one of our legal partners if you are interested in seeking independent legal advice in respect of your own business circumstances.

Stuart Talbot

Head of the Recruitment Finance Division
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What are the Agency Workers Regulations 2010?

On the 1st October 2011 the Agency Workers Regulations 2010 (AWR) will become law and will have to be followed. The AWR are a set of regulations that provide agency workers with a number of rights, including those rights listed below.

Day 1 Rights

From the 1st October 2011, hirers of agency workers must ensure that the worker has access to the same collective facilities and amenities as a comparable worker or employee of the hirer (a worker or employee working for and under the supervision and direction of the hirer and who is engaged in the same or broadly similar work as the agency worker). Collective facilities will include, for example, canteen or other similar facilities, childcare facilities and transport facilities. An agency worker will also have the right, during an assignment, to be informed of any job vacancies with the hirer. The Temporary Work Agency (TWA) supplying the agency worker to the hirer will not be held responsible for day one liabilities as they have no control over the hirer's supply of collective facilities and services.

Equal Treatment following completion of the Qualifying Period

Once the agency worker has completed the qualifying period under the AWR (see below), they will then have a right to equal treatment under Regulation 5 of the AWR. An agency worker will have the right to receive equal treatment in connection with pay, the duration of working time, night work, rest periods, rest breaks and annual leave. One key example of how agency workers will benefit from the right to equal treatment under the AWR is that pregnant agency workers will now be entitled to take paid leave for ante-natal appointments on completion of the qualifying period.

What is the Qualifying Period?

To complete the qualifying period, an agency worker must work in the same role with the same hirer for 12 continuous calendar weeks during one or more assignments. Once this period has been completed the agency worker will then be entitled to the right to equal treatment under Regulation 5, in addition to the day one rights explained above.

The qualifying period can be accrued irrespective of whether an agency worker works full or part-time for the hirer. For example, an agency worker may only work one day a week, but they will still be entitled to equal treatment after completing 12 continuous

calendar weeks in the same role with the same hirer on assignment. Provided that the agency worker works during that calendar week, a calendar week will be accrued regardless of how many hours the agency worker completes on a weekly basis.

If an agency worker takes on a new assignment with the same hirer which is substantively different to their previous role, the agency worker will not continue to accrue the qualifying period or, if the qualifying period has already been accrued, they will not continue to benefit from the right to equal treatment under Regulation 5 of the AWR. The agency worker will not be working in the "same role" for the hirer for the purposes of the AWR. A new qualifying period will start to accrue once the agency worker has begun work on the new assignment.

If an agency worker has a break of more than six calendar weeks between assignments or during an assignment, and this break does not fall within Regulation 7(8) of the AWR, the agency worker will not continue to accrue the qualifying period under the AWR, or, if the qualifying period has already been accrued, they will not continue to benefit from the right to equal treatment under Regulation 5 of the AWR. A new qualifying period will start to accrue once the agency worker has resumed work on the assignment.

Regulation 7(8) of the AWR sets out a number of circumstances, in which the qualifying period may, in practical terms, be paused and then re-started. These include:

- A break for any reason that is not more than six calendar weeks;
- The agency worker being incapable of working due to sickness or injury;
- Annual leave or maternity, paternity or adoption leave;
- Shutdowns – (eg: factory closures/school holidays);
- Jury service; and
- Industrial action.

How to calculate the qualifying period

The 12 week qualifying period is only triggered once the agency worker has been working in the same job with the same hirer for 12 consecutive calendar weeks. For the purposes of the AWR, a calendar week will consist of any period of seven days starting with the first day of an assignment. Provided that the agency worker works during that calendar week, a calendar week will be accrued regardless of how many hours the agency worker completes on a weekly basis.

Therefore, even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after 12 continuous calendar weeks.

For example, if the agency worker begins work on a Tuesday all the work that they have done up to and including the following Monday will count as one calendar week.

An agency worker will only start to accrue the 12 week qualifying period once the AWR have come into force on 1st October 2011, even if the assignment started before 1st October 2011.

An agency 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 TWA to the hirer over the course of that period of time.

It is also important to be aware of the fact that multiple qualifying periods can run at any one time if an agency worker works for more than one hirer.

Family-friendly rights

Under the AWR, pregnant agency workers who have completed the qualifying period will also be entitled to take paid leave for ante-natal appointments.

If the agency worker is absent from their assignment due to pregnancy, childbirth or maternity at any time from the start of the pregnancy up until 26 weeks after childbirth, then the qualifying period continues to accrue during the absence for the original intended duration of the assignment or likely duration of the assignment (whichever is the longer).

Similarly, if the agency worker has to be absent from their assignment due to statutory or contractual maternity, adoption or paternity leave to which the agency worker is entitled, then the qualifying period continues to accrue during the absence for the original intended duration, or likely duration (whichever is the longer), of the assignment.

More than one agency worker

Additionally, replacing one agency worker with another on assignments of no more than 12 weeks is not expressly prohibited within the regulations. However, the cost implications of induction and lack of continuity should be considered before implementing this model. Further, there is a serious risk that the hirer and / or TWA may be deemed to be structuring assignments in a manner intended to prevent the agency worker from accruing the qualifying period under the AWR. This may contravene the anti-avoidance provisions contained within Regulation 9 of the AWR, for which the maximum compensation award is £5000 if successfully challenged by an agency worker in an employment tribunal.

Who will the AWR affect?

Under the AWR, a TWA is defined as a person engaged in economic activity (whether for profit or not and whether part of the public or private sector) that: (A) supply individuals to work temporarily for and under the supervision and direction of hirers; or (B) pay for, or receive or forward payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers. This could be a 'high street' agency or an intermediary such as an umbrella company or a master or neutral vendor. In layman's terms, if you are involved in the supply of temporary agency workers then you are likely to be classed as a TWA and be liable under the AWR.

The AWR do not cover employment agencies who introduce workers to hirers for direct or permanent employment. In these situations, once a worker is placed in a permanent position with the hirer they will have no further contractual relationship with the agency and will not be supplied for the purposes of the AWR.

Temporary worker agencies (TWA)

If your business supplies temporary agency workers to organisations then it is likely to be classed as a TWA and will be responsible for finding out about pay and basic working conditions at the organisations that it supplies agency workers to (hirers) before placing any agency workers with an organisation. By requesting this information from the hirer, your business can ensure that the agency workers being supplied to the hirer receive the same basic working and employment conditions, following completion of the qualifying period, that they would have been entitled to if they had been recruited directly by the hirer to do the same job.

Agency workers

From 1st October 2011, day one of the AWR implementation, agency workers will be entitled to access the same collective facilities and amenities as a comparable worker or employee of the hirer (see above for further details). An agency worker will also have the right, during an assignment, to be informed of any job vacancies with the hirer.

Once the agency worker has worked in the same role with the same hirer for 12 continuous calendar weeks, the agency worker will then be entitled to the same basic working and employment conditions as he/she would have been entitled to if he/she had been directly recruited by the hirer (see below for further details).

Hirer

If you work with a TWA and receive temporary workers from or through it, you must ensure that you supply the TWA with an up to date copy of your terms and conditions so that they can ensure the agency worker is receiving equal treatment following completion of the qualifying period. It is also the hirer's responsibility to ensure that the agency worker has access to the same collective facilities and amenities as a comparable employee or worker at the hirer (see above for further details) as well as information on job vacancies at the hirer from day one of the agency worker being engaged on an assignment with that same hirer

Rights and benefits

What new rights will be introduced?

Following implementation of the AWR and successful completion of the 12 week qualifying period, agency workers will be entitled to the same basic working and employment conditions as if they had been recruited directly by the hirer to do the same job. These conditions include:

- Pay – this will include any sums payable to a comparable worker or employee of the hirer, including any fee, commission, bonus, holiday pay or other emoluments referable to the employment (unless the payment or reward is specifically excluded from the definition of “pay” – see below). For more information on “pay” please see our “what pay includes” section below. Please note that certain payments and rewards are excluded from the definition of “pay” under the AWR and these are dealt with in our “benefits not in scope” section below.
- The duration of working time
- Rest breaks
- Rest periods
- Night work
- Annual leave – the agency worker will be entitled to the same annual leave (potentially over and above the statutory entitlement) as a comparable employee or worker.

Please note the Government has indicated that where the annual leave entitlement exceeds the statutory minimum (currently 28 days) payment for

the additional leave can be paid in lieu of the agency worker taking leave. However, the agency worker must be given the same opportunity to take the full leave entitlement if they choose to. In order to ensure you are covered on this point we would suggest that you secure a written agreement from the agency worker before making any holiday payment in lieu.

What pay includes

Having successfully completed the 12 week qualifying period, the agency worker will be entitled to the same basic working and employment conditions for doing the same job as if he had been directly recruited by the hirer. This will include the same rights as are ordinarily included in the contracts of comparable employees or workers of the hirer (whichever is applicable).

With regard to pay, the Government asserts that this will include:

- Basic pay
- Payment for annual leave
- Overtime payments, subject to any requirements regarding the number of qualifying hours
- Shift / unsocial hours allowance
- Risk payments for hazardous duties
- Bonus or commission payments directly attributed to the amount or quality of the work done by the agency worker
- Vouchers or stamps which have a monetary value but are not part of a salary sacrifice scheme (for example, childcare vouchers or luncheon vouchers)

Benefits not in scope

There are a number of payments and rewards that will not be included within the scope of the definition of “pay” in the AWR. These include:

- Redundancy pay
- Occupational sick pay – agency workers will still be entitled to statutory sick pay
- Payment by way of a pension, allowance or gratuity in connection with retirement or loss of office
- Occupational pension pay
- Guaranteed payments (i.e. a guaranteed payment made during periods of lay-off or short-time working)
- Payments or rewards linked to financial participation schemes
- Payment for paternity, maternity, and adoption leave
- Expenses incurred by the worker or employee in carrying out the employment (for example, travel and accommodation)
- Payment for time off for trade union duties
- Advances in pay or loans
- Bonus or incentive payments that are not directly linked to the amount or quality of work done (for example, given as an incentive or reward for loyalty or long-term service)
- The majority of benefits in kind not directly linked to the amount or quality of work done.

Outside the scope

EU Temporary Workers Directive

Those agency workers who work outside of the UK will not fall within the scope of the AWR. Each EU member country will have to implement the EU Temporary Workers Directive by the 5th December 2011, which means that from December 2011 individuals working in other EU countries will fall under that individual country's domestic legislation.

Self Employed

Not all individuals working through TWAs will fall within the scope of the AWR. The genuinely self-employed (those in business on their own account) are exempt where the status of the hirer or the TWA is that of a client or customer of a profession or business undertaking carried on by the individual.

Managed Service

In addition, those working under the supervision and direction of the supplier rather than the hirer (i.e. providing a managed service) will not fall within the scope of the AWR. This type of structure would mean that workers would not be working "temporarily for and under the supervision and direction of hirers" as is required by the definition of a TWA under the AWR.

Tax Law

The AWR will not affect tax law and tax status, however, the tests used to assess whether an individual is genuinely self-employed for tax purposes may be similar to those used for AWR (although this cannot be guaranteed). It is therefore possible that some limited company contractors working outside IR35 may not fall within the scope of the AWR.

However, those claiming that workers fall outside of the AWR are likely to be heavily scrutinised. In the event of a dispute, it will be for an employment tribunal to determine the reality of the relationships between the parties involved and whether they fall within the scope of the AWR.

What is the Swedish Derogation?

Firstly, it is important to make it clear that the Swedish Derogation is a complicated part of the AWR. Regulations 10 and 11 of the AWR provide an exemption from an agency worker's right to equal treatment under Regulation 5 of the AWR in so far as it relates to pay. This exemption is known as the Swedish Derogation.

For clarification, the Swedish Derogation does not prevent an agency worker being entitled to equal treatment with regard to other basic working and employment conditions under Regulation 5 of the AWR (it only relates to pay) or the day one entitlement for agency workers to access collective facilities and amenities and to be informed of job vacancies at the hirer.

In order to rely on the Swedish Derogation, the TWA must:

- (A) provide the agency worker with a permanent contract of employment that meets certain minimum requirements; and
- (B) pay the agency worker a minimum amount between assignments and carry out additional tasks when the agency worker is not working for the hirer, but is available to do so.

The contract of employment must also contain a statement that the effect of entering into it is that the employee does not, during the currency of the contract, have any entitlement to the rights conferred by Regulation 5 in so far as they relate to pay.

TWAs' Obligations

A further requirement of the Swedish Derogation is that, during any period under the contract after the end of the first assignment under that contract, in which the agency worker is not working temporarily for and under the supervision and direction of hirer, but is available to do so:

- The TWA must take reasonable steps to seek suitable work for the agency worker;
- If suitable work is available, the TWA must offer the agency worker to a hirer who is offering such work; and
- The TWA must pay the agency worker a minimum amount of remuneration in respect of that period (the minimum amount).

Regulation 11 of the AWR clarifies how a TWA should calculate the minimum amount of remuneration due to a worker for these purposes.

The TWA must not terminate the contract of employment until it has complied with its obligations when the agency worker is not working (see above) for an aggregate of not less than four calendar weeks during the contract.

Seek Advice

There is still uncertainty around how Regulations 10 and 11 of the AWR will be interpreted by an employment tribunal and how TWAs should implement the requirements of Regulations 10 and 11 in practice. There is no case law addressing the Swedish Derogation provisions, which means that you should seek independent legal advice before relying on it as an exemption to the obligation to provide parity of pay under the AWR.

Who is liable?

Hirers and TWAs should not assume that responsibility for providing equal treatment will fall to the TWA at the bottom of the supply chain. This is not the case.

Day 1 liability

Day 1 liability (in relation to access to collective facilities/ amenities and permanent employment opportunities) rests with the hirer. As previously mentioned, it is the hirer's responsibility to provide the TWA with its terms and conditions so that the TWA can ensure that the agency worker receives equal treatment in respect of access to collective facilities and amenities at the hirer and informing the agency worker of job vacancies at the hirer from day one. The TWA will not be held responsible for day one liability.

Basic working and employment conditions

If the agency worker does not receive equal treatment with regard to basic working and employment conditions at the hirer, then liability under the AWR could lie with the TWA (or TWAs if more than one is involved in the supply of the agency worker) and/or the hirer. TWAs and hirers will be liable for a breach of equal treatment under Regulation 5 to the extent that they are responsible for the breach. The responsibility for failure to treat the agency worker equally with regard to basic working and employment conditions could therefore be shared between the TWA(s) and the hirer or it could lie solely with just one of these parties.

Although, the TWA may be able to defend its position under Regulation 14 of the AWR if it can prove that it obtained or took 'reasonable steps' to obtain the relevant information from the hirer regarding its basic working and employment conditions and acted in accordance with the other requirements of Regulation 14. If the TWA can establish this defence then it would not be held liable for the breach of the AWR and it is likely that the hirer would be held liable.

This highlights the importance of all parties sharing information all the way along the supply chain. By sharing information all parties will find it easier to follow the AWR and it should reduce the potential risk of liability and action being taken in connection with the AWR. As a matter of good practice, TWAs should check regularly whether the hirers that they supply agency workers to have made any changes to their basic working and employment conditions (including pay rates) which may affect the agency workers.

Compensation

Hirers and TWAs who try to avoid their obligations under the AWR could face a compensation award of up to £5,000 per incident, which may in turn have a significant impact on their finances (especially if more than one agency worker brings a complaint against them under the AWR). The best way to seek to protect your business against a complaint being brought by an agency worker under the AWR, and an award, is to seek independent legal advice and to implement the advice given.

Reduced access to funding

With the AWR coming into force on 1st October 2011, the 12 week qualifying period can start to accrue from that date. This means that a complaint relating to equal treatment under Regulation 5 of the AWR could theoretically be brought on 25 December 2011. However, please be aware that an agency worker could pursue a complaint under the AWR in relation to Day 1 rights on and from 1 October 2011.

It is possible that funders might review facilities if a TWA cannot provide satisfactory confirmation of its compliance with the AWR. By being unprepared for the implementation of the AWR, you are not only risking a compensation award in an employment tribunal but your bank or invoice lender could potentially decide to reduce or withdraw your funding.

Risk assessment

The first step for any business which falls within the scope of the AWR is to carry out a risk assessment so that you can fully understand how the regulations are likely to affect your use of temporary agency workers, contractors and other non-directly engaged individuals within your business.

If you are a member of ASPCo or the REC then you can pick up an AWR Impact Assessment from the following websites.

www.rec.uk.com

www.apsco.org

www.jobsatteam.com

Independent legal advice

There are a number of AWR preparation tools available for TWAs and hirers alike but we would strongly advise that all recruitment businesses seek independent legal advice regarding their own business circumstances. Within the Recruitment Finance Division of Lloyds TSB Commercial Finance, it is our belief that recruitment businesses will put themselves in the best position to ensure compliance with the AWR by taking independent legal advice. The legal advisor will then be able to take into account the various contracts and operating methods employed within your business, and throughout the supply chain, when offering you legal advice relating to the AWR.

Until cases are brought before an employment tribunal, the interpretation of the AWR will differ between legal advisors, but by seeking and implementing their advice you can demonstrate to regulators and funders that you have sought to ensure compliance with the AWR and you should be protected by their Professional Indemnity cover for the advice given.

If you are unsure as to which legal advisor to go to for advice then our client managers are on hand to provide you with information and contact details for our recommended legal partners.

AWR tools and information

Throughout June and July we hosted a number of AWR seminars across the country to help our clients understand the final AWR guidance and to prepare for the implementation of the AWR in October.

If you were unable to attend one of the seminars there is a video of the Birmingham AWR event available via our client managers. [The video](#) is segmented in to 13 key legislative areas so that it is easy to navigate.

Useful Links

www.brabnerschaffestreet.com

www.rec.uk.com/awr

www.rec.uk.com/press/news/1208

www.apsco.org/Members_services/awr.aspx

www.jobsatteam.com

What comes next?

First case

The legislation comes into force on 1st October 2011. An agency worker could pursue a complaint under the AWR in relation to Day 1 rights from that date. More complaints are likely to be made following completion of the 12 week qualifying period and concerning the right to equal treatment under Regulation 5 of the AWR. An agency worker will only be able to accrue the qualifying period from 1 October 2011. Accordingly, the first non-compliance case concerning Regulation 5 could theoretically be filed on 25 December 2011.

Until we have some case law in place to set a precedent it will be extremely difficult to judge how some provisions of the AWR will be interpreted by an employment tribunal. Accordingly, it is extremely important that all recruitment businesses keep up to date with AWR developments and ensure that they have the correct measures in place to comply with the AWR.

Legislative review

Ed Davey, Employment Minister, announced that a formal review of the AWR will take place in 2013. Until the review takes place, TWAs will have to rely on the precedent set by the case law and the advice of independent legal and financial advisors.

How we can help

- Our client managers have a clear knowledge and understanding of AWR and are here to help you with any financial questions you might have.
- We can introduce you to our recommended independent legal partners who will be able to help you with any legislative questions.
- All of our clients have a dedicated client manager who understands the individual business and its needs
- Our [AWR video](#) is available via our client managers

Terminology

Terminology	Abbreviation	Explanation
Agency Workers Regulations 2010	AWR	New regulations that will apply to agency work from 1 October 2011
Temporary Work Agency	TWA	Recruitment agencies that supply temporary agency workers and meet the other requirements of the definition under the AWR
Agency Worker		Temporary agency workers as defined under the AWR
Hirer		The person to whom the agency worker is supplied in accordance with the definition of a hirer under the AWR
Day 1 rights		The rights that the agency worker is entitled to from day one of working on an assignment
12 week qualifying period		The agency worker must complete a 12 week qualifying period before they are entitled to the right to equal treatment under Regulation 5 of the AWR

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