

Agency Workers Regulations 2010 to remain unchanged

In July 2010, the new coalition government's Employment Relations Minister, Edward Davey, announced his intention to review the Agency Worker Regulations 2010, due to various concerns of the business community. He has now announced that the government will not be amending the Regulations before they come into force in October 2011. This significant announcement was made the day before the Government's eagerly anticipated Comprehensive Spending Review and so appears to have gone largely unnoticed.

Jonathan Bruck, senior solicitor in the Employment team at IBB Solicitors, summarises the legislation, its potential implications and why it may lead many companies to carefully consider their use and terms of engaging agency workers

Background

The Regulations were laid before Parliament on 21 January 2010 and are due to come into force on 1 October 2011. They will apply to most workers who are supplied by an agency to a hiring company ("hirer").

At the heart of the Regulations is the obligation to ensure that longer serving agency workers are given equality with permanent employees in respect of core entitlements. It is the potential cost of this that has caused businesses most concern, particularly given the current economic climate.

Equal treatment

Under the Regulations, an agency worker will be entitled to the same "basic working and employment conditions" as he would have been entitled to if he had been directly employed (as a permanent employee) by the hirer to do the same job. In other words, the worker's basic terms and conditions will need to at least match those of a comparable permanent employee doing the same job.

Those basic terms and conditions include:

- Pay. This includes basic, holiday and overtime pay. It also includes shift allowances, unsocial hours premiums/bonuses, luncheon/travel vouchers and bonuses linked to individual performance.
- Duration of working time
- Length of night work
- Rest periods
- Rest breaks; and
- Annual leave.

Qualifying period

However, only agency workers who have undertaken the same role, with the same hirer, for 12 continuous weeks will qualify for this right.

Therefore, agency workers brought in to work for a short time (perhaps to work on a one-off corporate event) are likely to be excluded. However, agency workers who work throughout the year (or during long seasonal upturns) could be included.

This qualifying period is broken (and will restart) if the worker:

- takes a break of at least six weeks either during or between assignments (although certain breaks, for example sickness absence, would not count towards the break);
- starts a new assignment with the same hirer with the work or duties which are "substantively different" from the work or duties he carried out during the previous assignment.

The Government included an anti-avoidance provision in the Regulations, to deter hirers from deliberately rotating workers to evade the equality obligations. If assignments are structured in a way designed to evade the Regulations, a fine of up to £5,000 could result.

Other rights

The Regulations also provide that agency workers will be entitled to further additional rights including:

- for pregnant workers and nursing mothers (e.g. reasonable paid time off to attend ante-natal appointments);
- the right to be told of any relevant employment vacancies at the company during any assignment;
- the right to be given the same opportunity as a comparable worker to find permanent employment within the company; and
- equal right to "collective facilities and amenities", including canteen and child care facilities

These are rights that will apply to all agency workers from day one (i.e. regardless of how long they have worked at the hirer).

Liability

Agencies and, in certain circumstances hirers, will be held liable for breaches of the Regulations on equality of basic terms and conditions. Liability depends on the extent to which agency or hirer is responsible for the breach (and the information given to the agency about terms and conditions of permanent employees).

Hirers will be solely liable for any failure to provide equal access to onsite facilities and employment opportunities.

Implications

The Regulations are likely to have a significant impact on working practices within many industries. It is because of this that the Government decided to delay

introducing the Regulations (to October 2011), to allow industries which are traditionally reliant on agency workers, such as tourism and catering, enough time to prepare.

Certain companies have already reacted though. For example, in the retail sector, it was announced some time ago that thousands of temporary workers at firms supplying Asda will get pay rates equal to permanent workers after a deal was struck on working conditions.

Companies reliant on agency workers would be advised to plan ahead by reviewing their use of agency workers and how the Regulations will impact on their businesses.

After October 2011, any hirer engaging an agency worker for a period likely to exceed 12 weeks, will need to assess what an equivalent permanent employee is paid and then (in tandem with the agency) would need to ensure that the worker is paid at the same level (after completing 12 weeks). An overall consequence of this will be an increased cost, which agencies will no doubt seek to pass on to the hirer.

This increased cost, may force some companies to consider other staffing options which provide flexibility, for example employing staff directly on zero hours or short fixed term contracts. However, there are potential risks of doing this, which need to be considered.

Companies that choose to continue using agency workers would be advised to work closely with the supplying agencies to minimise the risk of falling foul of the Regulations and to reduce costs. They may also wish to review their contracts with the agencies and perhaps agree to apportion liability that may result from any breach by agency/hirer.

The Government hopes to publish guidance on the Regulations in early 2011.

If you would like to talk to us about the issues raised in this article, please contact:

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