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The United Kingdom's Agency Worker Regulations 2010: How Do They Affect You?

By Tahl Tyson and Anita Vadgama
(U.S. Attorneys; Solicitors in England and Wales)

With an ever changing economic climate, temporary workers have played an important role in providing flexibility for U.K. businesses. However, that may change as a result of the Agency Workers Regulations 2010¹ ("the Regulations"), which came into force on October 1, 2011. Indeed, employers have been awaiting their introduction with unease. Essentially, these regulations give temporary agency workers who work on assignments of 12 weeks or more the same entitlement to basic employment terms and conditions as comparable permanent employees.

The Regulations are derived from the E.U. Temporary and Agency Workers Directive,² a directive proposed by the E.U. in 2002 but whose enactment was blocked by several EU countries – including the U.K. – until 2008. The Directive is the third piece of legislation the E.U. has passed in order to protect the rights of what are called "atypical workers" in the United Kingdom, the other protections being for part-time and fixed-term workers. The ultimate aim of this legislation is to advance equal opportunity in the workplace regardless of a person's employment status, but only time will tell if the Regulations have any real effect.

Who Is Covered in the Regulations?

There are three players: a **temporary worker agency (TWA)**; an **agency worker**; and a **hirer**. A TWA is a supplier of agency workers who will work temporarily for a third party – the hirer.³ Not only are agencies that actually engage agency workers included in the definition of a TWA, but so are intermediaries who assist in supplying agency workers to a hirer. For example, the hirer may hire one agency – a master vendor – to manage its recruitment process. The master vendor may then use other recruitment agencies to provide the hirer with agency workers. Such an intermediary would be a TWA because of its role in supplying agency workers and if they forwarded wage payments to these agency workers. That said, the Regulations are not intended to cover employment or recruitment agencies who introduce workers to employers for direct and/or permanent employment.

An *agency worker* is someone who works temporarily under the supervision and direction of the hirer but has a contract with the TWA.⁴ The definition of an agency worker excludes

individuals who are in business on their own account, are free to have other clients, and are hired by their clients or customers to perform specific services, for example specialized consultants, doctors or lawyers.

Finally, the *hirer* is a person who is engaged in an economic activity and who hires agency workers using a TWA.⁵ The hirer must supervise and direct an agency worker in order to fall within the scope of the Regulations. If a contractor was hired by a company to provide a certain service, such as cleaning, and as a result the contractor used its own workers to provide those services at the company's premises, the company would not be a "hirer" so long as the contractor was genuinely engaged in supervising and directing its workers on-site on a day-to-day basis and determined how and when the work was done.

In-house temporary staffing banks will likely not be considered TWAs (*i.e.*, where a company employs its own temporary workers directly and the workers are only supplied to work in its business). Nevertheless, these employees would be afforded protection under the Fixed Term Employees (Prevention of Less Favorable Treatment) Regulations 2002.

What Statutory Entitlements Do Agency Workers Have from Day One?

From **day one**, agency workers must be given the same access to collective facilities that are provided by the hirer to comparable employees and workers, for example a canteen or a staff childcare facility. Agency workers must also be given the same access to information regarding any relevant job vacancies the hirer has available.⁶ Although a hirer may be able to defend treating an agency worker less favorably if there is a "good reason," it is unlikely that cost will qualify as a valid reason if it is the sole factor in denying access. It is important to note that, if an agency worker believes he or she has been treated less favorably under these regulations, the worker must identify an actual comparator. The comparator must perform the same or broadly similar work as the agency worker and work for the hirer at the same location, or failing that at another facility of the hirer.

What Statutory Entitlements Do Agency Workers Have After the Qualifying Period?

After an agency worker **completes a 12-week qualifying period** with the same hirer, in the same role, that worker will be entitled to many, though not all, of the same terms and conditions of employment applicable to regular employees, which include:⁷

- Key elements of pay
- Duration of working time
- Night work
- Rest periods
- Rest breaks
- Annual leave
- Pregnant agency workers would also be entitled to paid time off for antenatal appointments

Pay includes basic pay, overtime payments, paid annual leave, and bonus or commission payments directly attributable to the amount or quality of the work done by the individual agency worker. It does not include occupational sick pay, pensions or maternity, paternity or adoption pay, redundancy pay, notice pay, expenses, bonuses that are not directly linked to the contribution of the individual or that are discretionary, and most in-kind benefits. If a hirer gives an annual pay increase, however, the agency worker should also receive a corresponding pay increase. Regarding working time entitlements, such as paid annual leave and rest breaks, the agency worker should receive the same amounts even if what is given to permanent comparable employees or workers is more than the statutory minimum requirement under the Working Time Regulations 1998.

It is important to note that the agency worker should be in the same role throughout his or her assignment(s). If the agency worker's duties substantively change during the assignment, this would have the effect of stopping the 12-week qualifying clock and setting it to zero. In such circumstances, the hirer must notify the TWA in writing that the work or duties have changed and this information must be passed to the

agency worker. Also, unlike with Day One entitlements, the agency worker does not have to look for an actual comparator in order to identify what basic terms and conditions they should be entitled to receive after the qualifying period. But if the agency worker identifies a comparator, that comparator must perform the same or broadly similar work as the agency worker. However, a difference in skills and qualifications may be taken into account to justify why a comparator is paid more than an agency worker.

How Can an Agency Worker Accrue 12 Weeks' Qualifying Service?

The Regulations do not apply retroactively, and, therefore, the accrual of the 12-week qualifying period will only start from the date the Regulations came into force – October 1, 2011. However, the Regulations do acknowledge that the working patterns of agency workers can be irregular. Further, TWAs and hirers may purposefully try to circumvent the reach and applicability of the Regulations by ending the service of an agency worker for a particular hirer before the agency worker has attained 12 weeks' service and then subsequently reengage the agency worker for the same hirer after a short period of time. To that end, the Regulations consider different situations where there may be a break in the agency worker's service with a hirer but the agency worker continues accruing 12 weeks' qualifying service.⁸ If there is a gap of no more than **six weeks** between assignments where both assignments are with the same hirer and the agency worker carries out the same role in both, the break in service will only temporarily halt the "12-week qualifying clock." The agency worker will continue to accrue qualifying service when s/he resumes working for the hirer. The "12-week qualifying clock" will also be paused if the agency worker becomes incapacitated because of sickness or injury for up to 28 weeks; if an agency worker takes leave to which s/he is entitled, for instance annual leave; or there is a break in service caused by a regular and planned shutdown by the hirer. The accrual of 12 weeks' service is not interrupted if an agency worker breaks the assignment due to pregnancy, childbirth or maternity or the worker takes maternity leave, adoption or paternity leave.

What Obligations Are Now Placed on TWAs And Hirers, and What Happens if They Don't Comply?

Recordkeeping Obligations

For each vacancy a TWA receives from a hirer, that agency must record details about the vacancy before they introduce an agency worker to the hirer. Whether or not an assignment is intended to last 12 weeks or more, it is good practice that the TWA ask for information from the hirer about its terms and conditions at an early stage and that this information is kept up to date. This information would not only include details regarding the hirer, the start date and duration of the assignment, but also the level of basic and overtime pay provided, the types of bonus scheme the hirer operates, and the applicable annual leave entitlement. Further, it is important that this information is supplied from one TWA to another where intermediaries are involved. In the event of a claim, the Employment Tribunal would decide which party was responsible for any breach to the extent that it is responsible for the infringement.

Information Obligations

An agency worker is entitled to information relating to equal treatment entitlements, if s/he believes these entitlements have been infringed.⁹ For Day One entitlements, the responsibility to provide information lies solely with the hirer and the information can be requested any time after the agency worker has started the assignment. The hirer has 28 days to respond in writing from receipt of the request stating all relevant information relating to the rights of a comparable worker or employee and reasons for the treatment of the agency worker. If the request is about entitlements after the 12-week qualifying period, then the requirement to provide information lies with the TWA and the agency worker can only request information after the 12-week period has elapsed. The TWA has 28 days from receipt of the request to respond in writing and must set out relevant information relating to basic working and employment conditions, how these basic working and employment conditions were determined, what terms and conditions an actual comparator cited by the agency worker has, and differences in treatment. If an agency worker does not receive this information within 30 days, the agency worker can then request the same information from the hirer.

Employment Tribunal Claims

If an agency worker is unsatisfied with the response or does not receive a response, s/he can then bring a claim in the Employment Tribunal. A hirer will be liable for failure to provide Day One entitlements. For failure to provide basic working and employment conditions, liability can rest with either the TWA or the hirer, or both. The TWA will be able to defend a claim if it took "reasonable steps" to obtain relevant information

from the hirer about its basic working and employment conditions and treated the agency worker accordingly.¹⁰ The hirer will be responsible for the breach to the extent that it is responsible for the infringement. If successful, the agency worker may receive financial compensation (minimum award of two weeks' pay), a declaration setting out the agency worker's rights in relation to the complaint, and/or the Tribunal may recommend that the hirer or TWA take certain action to remove the adverse effect on the agency worker. Lastly, if a Tribunal finds that there was a pattern of assignments that indicated an intention to deprive the agency worker of his or her rights, the Tribunal could make an award of up to £5,000.¹¹

Some Practical Considerations

The cost of hiring an agency worker may now increase for the hirer, as a result of the TWA passing through the costs it will inevitably incur as a result of complying with the Regulations. Comparable employees of the hirer are more likely to be paid a higher salary than their agency worker counterparts. A hirer may find that when its contract with a TWA expires or is re-negotiated, the cost of hiring agency workers under a new contract will increase. But while agency workers may be more expensive to engage now, they still may be cheaper than hiring permanent employees. It is important to note that in-kind benefits given to permanent employees do not have to be given to comparable agency workers, and, therefore, are not an element in evaluating the economic cost of the hiring package for an agency worker. Further, there are other advantages to using agency workers. For instance, hiring agency workers still gives the hirer flexibility with respect to the structure of its workforce so that it can cope with the changing needs of its business and effectively control its headcount.

If a hirer is concerned about how the new Regulations will affect its business, conducting a cost-benefit analysis is recommended. In this analysis, hirers should not only consider the increased cost of paying TWAs for the use of agency workers but they should also consider the increased costs in administration (particularly borne by HR) in complying with the regulations themselves.

Hirers should also be careful that agency workers do not become *de facto* employees, and, therefore, have the right to claim that the hirer is their employer rather than the TWA. The longer the assignment the agency worker has with a hirer and the more control the hirer exerts over the agency worker, the more likely an Employment Tribunal is to believe that there is an employment relationship between them. Hirers can minimize the risk by, for example, assessing the nature of work that agency workers are engaged to do; focusing on using them for specific projects or cover for fixed periods only; and minimizing their integration into the workforce. To that end, hirers should not give agency workers management or supervisory roles; they should not train them, and generally should not involve them in employee events such as employee briefings, team-building exercises, and company social events. On a day-to-day basis, hirers should reduce their control of agency workers and, at the very least, should not review or discipline them. Instead, the TWA should address these situations directly.

The Department for Business, Innovation and Skills has put together a useful guide on how the regulations work.¹²

Tahl Tyson is a Shareholder in Littler Mendelson's Seattle office, and Anita Vadgama is Special Counsel in the Boston office. Ms. Tyson and Ms. Vadgama both are qualified as Solicitors in England and Wales. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Tyson at ttyson@littler.com, or Ms. Vadgama at avadgama@littler.com.

¹ <http://www.legislation.gov.uk/uksi/2010/93/contents/made>.

² 2008/104/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:01:EN:HTML>.

³ Regulation 4.

⁴ Regulation 3.

⁵ Regulation 2.

⁶ Regulations 12 and 13.

⁷ Regulations 5 and 6.

⁸ Regulation 7.

⁹ Regulation 16.

¹⁰ Regulation 14(3).

¹¹ Regulations 9 and 18(14).

¹² <http://www.bis.gov.uk/policies/employment-matters/eas>.