

# THE AGENCY WORKERS DIRECTIVE (AWD) EXPLAINED

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This document aims to:

- Provide advance notice of the AWD while the legislation is going through the parliamentary process;
- Provide a basic understanding of current requirements of the Agency Workers Directive;
- Investigate the broad impacts, obligations and risks to both the agency and the hirer.

It should be noted that this legislation is currently undergoing the parliamentary process and it will either be voted in as it stands or rejected. According to BIS, the timescale for this is anticipated to be before Easter. Once the parliamentary process has been completed, we expect BIS to produce formal guidance which will significantly assist with interpretation. Information contained within this report has been obtained from the following documentation:

- [The Agency Workers Regulations 2010](#) (made 20<sup>th</sup> January 2010 and laid before Parliament 21<sup>st</sup> January 2010)
- Department for Business Innovation & Skills (BIS) Implementation of the Agency Workers Directive – [Response to Consultation on Draft Regulations – January 2010](#)

## Overview of the AWD

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The Agency Workers Regulations 2010 will come into force in the UK on 1<sup>st</sup> October 2011.

The AWD is designed to give agency workers the right to equal treatment after 12 calendar weeks in a given job. The regulations require:

- An agency worker to be treated as if he/she had been recruited directly to do the same job in relation to basic employment and working conditions (whether the direct recruitment would have been as an “employee” or as a “worker”);
- Equal treatment in respect of basic terms & conditions ordinarily incorporated into contracts of those working for the hirer (see the section “What is Included” below);
- That to be deemed compliant, the treatment needs to be consistent with that given to a true comparable employee (see the [examples to illustrate equal treatment](#) below).

# What does Equal Treatment Mean?

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The requirement is simply to treat the worker in relation to basic working and employment conditions as if he/she has been recruited directly to the same job. You can take into account the agency worker's qualifications, experience or expertise (or lack of them!) – you simply need to provide the treatment you would have given **that person** if recruiting them directly to do **that job**.

Equal treatment only covers “basic working and employment conditions” (i.e. those conditions that apply generally in the workplace concerned). These terms & conditions will relate to working time, overtime, breaks, rest periods, night work, holiday & public holidays and pay (see section on [Equal Pay](#)) set out in:

- A pay scale or pay structure;
- A relevant collective agreement;
- A company handbook or similar;
- Conditions written into a permanent employee's written contract as a matter of course or those things that have not been written down but have clearly become established as a matter of “customer and practice” in the workplace concerned.

In many cases, the simplest approach will be to compare the position of the agency worker with that of permanent employees doing the same or broadly similar work.

## Examples to Illustrate Equal Treatment

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### 1. WHERE THE HIRER HAS PAY SCALES OR PAY STRUCTURES IN PLACE

**Question:** A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience; however the agency worker is paid at the bottom of the pay scale. Is this equal treatment?

**Answer:** Yes, if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly, **but** if the worker's experience would mean starting further up the pay scale if recruited directly, then the agency worker would be entitled to the same treatment.

### 2. WHERE THERE ARE NO PAY STRUCTURES, BUT A “GOING RATE”

**Question:** A hirer has decided to increase its workforce on a particular shift with agency workers. There are 10 permanent staff and 3 agency workers doing the same work. The permanent staff are paid between £8-£10 per hour – those recruited most recently being paid £8 per hour and the higher rate reflecting on the job experience. The work involves no specialist skills and only minimal on-job training. The agency workers are recruited at a rate of £6 per hour and continue to be paid that rate after 12 weeks. Is this allowed?

**Answer:** No. There is clearly a “going rate” of at least £8 per hour for the job and agency workers would be entitled to at least this after 12 weeks on assignment.

**3. WHERE THERE ARE NO PAY SCALES OR STRUCTURES OR COMPARABLE PERMANENT EMPLOYEES**

**Question:** A small company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same or a similar job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12 week qualifying period. Is this allowed?

**Answer:** Yes. There are no pay scales or collective agreements, nor a “going rate”, so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However, if, say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public holidays, the agency worker would be entitled to the same treatment on these points.

**4. WHERE ALL DIRECTLY RECRUITED TERMS ARE INDIVIDUALLY NEGOTIATED**

**Question:** A small sales company pays its 10-person sales force at different rates. The rates vary considerably and all depend on individual negotiation. There is no “going rate”. An agency worker is paid at the same rate before and after the qualifying period. Is this equal treatment?

**Answer:** Yes, if all rates really are individually negotiated and there is no established custom and practice as regards pay – which the hirer and agency would need to be very clear was the case. But, as in the previous example, if there is a clear company policy on, for instance, annual leave, the agency worker would be entitled to equal treatment in that respect.

# What is Included?

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## Equal Pay

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Pay is based on the principle of “equal pay for work done”:

<b>What <u>IS</u> Included</b>	<b>What is <u>NOT</u> Included</b>
<p>Contractual entitlements directly linked to the work undertaken whilst on assignment including:</p> <ul style="list-style-type: none"><li>• Basic pay</li><li>• Overtime</li><li>• Shift allowances</li><li>• Unsocial hours premiums</li><li>• Payments for difficult / dangerous duties</li><li>• Bonuses / commissions that are directly attributable to the quality or quantity of work done by the agency worker or those linked to individual performance / performance appraisal arrangements* and which would have been payable to the worker concerned during the period of the assignment, had they been recruited directly</li><li>• Vouchers or stamps with a monetary value (e.g. luncheon vouchers, transport vouchers)</li><li>• Childcare vouchers with a monetary value that are not funded on the basis of a salary sacrifice scheme</li><li>• Holiday pay</li><li>• Collective agreements (i.e. terms generally included in employees’ written contracts and other matters of “customer and practice” in the workplace concerned)</li></ul>	<p>Other aspects of remuneration that are provided in recognition of the long-term relationship between employer and employee such as:</p> <ul style="list-style-type: none"><li>• Profit sharing schemes</li><li>• Share ownership schemes</li><li>• Occupational pension contributions</li><li>• Occupational sick pay</li><li>• Redundancy pay</li><li>• Maternity pay</li><li>• Individually negotiated contract terms of one-off discretionary payments</li><li>• Bonuses that are not directly attributable to the amount of quality of work done by the agency worker. Bonuses that are given for another reason such as long-term performance or designed to</li><li>• Childcare vouchers if they are funded on the basis of a salary sacrifice scheme</li></ul>

\*The regulations do not require integration of agency workers into the permanent performance appraisal system for permanent staff – they require equal treatment in terms of the end, not the means, so hirers can adopt much simpler systems for the tracking of agency worker’s performance. For further information see the section entitled [Employment Status of the Agency Worker](#).

## Equal Treatment

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Equal treatment also includes:

- Working time;
- Breaks;
- Rest periods;
- Night work;
- Holidays / bank holiday entitlement – the worker will be entitled to the same annual leave (including bank holidays) that they would have received if recruited directly including entitlement above the statutory minimum. It is permissible to provide payment in lieu of additional holiday entitlement where this is above the statutory minimum either as part of the daily / hourly rate or at the end of an assignment;
- Access to the amenities or collective facilities (e.g. canteen, childcare, transport etc). A non-exhaustive list of such facilities will be drawn up to indicate clearly which kind of facilities should be included;
- Access to vacancies within the hirer's organisation - agency workers must be informed of any vacant posts in the hirer's organisation in order to give them the same opportunity to apply as comparable employees or workers. This is a "day one" entitlement. This right need not apply in the context of any genuine headcount freeze as this would constitute restructuring. Liability for compliance with this would remain wholly with the hirer.

## Treatment for Pregnant Women

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The regulations around pregnant women include:

- Pregnant women are to be allowed reasonable paid time off to attend ante-natal appointments and measures to protect their health & safety and that of their child;
- The hirer would be required to carry out a risk assessment and make adjustments to remove the risk. If this is not possible then it would fall on the agency to offer alternative work or if this was not possible, pay the agency worker for the period of the assignment when she could not work due to the health & safety risk. A woman would not be eligible to be paid if she unreasonably refused alternative work;
- In the event of a woman changing assignments due to health and safety, the clock would continue to tick as if she were on the original assignment and she would be entitled to pay and conditions at least equal to those she received on the original assignment. She would also be able to accrue weeks in relation to the new hirer where she is working in another role so that she will not be disadvantaged in the move;
- It may be that the clock continues to tick throughout the protected period of up to 26 weeks after the woman has had her child – this is still being considered as an option;
- Liability in relation to this would sit with the agency;
- To be eligible for this the woman would have to have completed the qualifying service of 12 weeks and have told the agency and hirer that she was pregnant;

- An agency refusing to place a pregnant woman or a hirer refusing to accept an agency worker on the grounds of pregnancy is discrimination under the Sex Discrimination Act.

## Who is Included?

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Included in the Scope of the AWD	<u>NOT</u> Included in the Scope of the AWD
<ul style="list-style-type: none"> <li>• Agency workers (including those on contract for services and “zero hours” contracts of employment or equivalent)</li> <li>• Workers employed or operating via umbrella companies or other intermediaries</li> <li>• Workers who operate a personal service company but who are not genuinely self-employed</li> <li>• Workers who are supplied through “intermediaries” such as Master Vendor / Vendor Neutral suppliers and any similar “chain” arrangement</li> </ul>	<ul style="list-style-type: none"> <li>• Workers who are genuinely self employed</li> <li>• Those working through their own limited liability company who are genuinely self employed</li> <li>• Workers employed on managed service contracts (where the Managed Service Provider is truly managing and directing the staff on site)</li> </ul>

Agency workers are described as being “supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer”.

There is no definitive definition for “self employed” as it is felt that the courts and tribunals will be capable of determining employment status and identifying avoidance tactics and that it would be almost impossible to anticipate and identify every possible avoidance scenario. They are, however, likely to fall back on existing tests for self employment such as those commonly used to establish whether someone falls within the definition of IR35.

## Timescales

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There is a **qualifying period of 12 calendar weeks** irrespective of working pattern (e.g. full or part time). **A new qualifying period will begin only if a new assignment with the same hirer is substantively different, or if there is a break of more than 6 weeks between assignments in the same role with the same hirer.**

The clock will stop ticking on either a qualifying period or break period when:

- The workplace is effectively closed (e.g. for supply teachers during the summer);
- There is an industrial action or lockout;
- The agency worker is taking annual leave;
- The agency worker is on sick leave with a doctor’s note.

# Employment Status of the Agency Worker

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The AWD is **NOT** designed to transfer the employment status of agency workers to the hirer and should not impact the current relationship.

Hirers may be concerned about the fact that bonuses that are directly attributable to the quality or quantity of work undertaken by the agency worker are included in the regulations; and that the performance measurement / appraisal process that may be required to facilitate payment of such bonuses or commissions may change the status of the agency worker to that of employee of the hirer, however in practice there is little risk of this.

The AWD requires equal treatment in terms of THE END, and NOT THE MEANS, so simple systems for tracking the agency worker's performance in conjunction with the agency concerned - perhaps making use of or adapting pre-existing performance feedback arrangements in place with the agency may be sufficient.

Further guidance on this will be made available by BIS on completion of the parliamentary process.

## Temp to Perm Fees

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Following extensive lobbying on this point, BIS has decided not to amend the Conduct Regulations.

## Liability & Dispute Resolution

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In the event of a breach, the agency will be liable unless they can demonstrate that they have taken "reasonable steps" to obtain the necessary information from the hirer, and have acted "reasonably" in determining the agency worker's basic working and employment conditions. If the agency had done this in good faith but had been provided with inaccurate or incomplete information, liability in the event of any claim would pass to the hirer.

Liability in relation to access to employment and collective facilities will, fall solely on the hirer, as the agency has no role in delivery of these rights.

Agency workers will be able to bring a claim to an employment tribunal but it is believed that the majority of cases will be resolved either by means of internal grievance procedures or through ACAS pre-claim conciliation which will, if necessary be able to consider tripartite cases.

Currently, it is possible for the hirer to indemnify themselves against claims through the contract that they put in place with the agency. This would be a very dangerous indemnity for an agency to agree to without any obligations on the client.

## Anti Avoidance Provisions

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Agency workers still have grounds for a tribunal if a structure of assignments develops, the most likely explanation for which is an intention to deprive them of equal treatment rights (e.g. rotation between a series of 11 week assignments in “substantively different “roles with a hirer). This is backed up by the possibility of an additional award of up to £5,000.

There is no definition for what constitutes “substantively different” although it is clear that the whole or main part of a role must be “substantively different” in order for the provision to apply – it is not enough for a small proportion of the role to change, however significant that change in itself might be. There will be a non-exhaustive list of factors that a tribunal would be asked to consider when deciding whether the structure of assignments amounted to avoidance.

It should also be noted that potential avoidance will be monitored extremely closely and that if patterns or techniques develop that can be construed as avoidance then it has been stated that these will be stamped out very quickly.

## Talking to Clients about the AWD

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Whilst it is probably too early to start planning for the new regime, it is worth ensuring that your staff are aware of the AWD and its implications and are able to answer basic questions from clients. Many clients are aware of the AWD, however have limited knowledge of the detail. A short overview for clients might include:

- Explaining the purpose of the AWD – why it’s coming about and what it means;
- Explaining the timescale for it coming into force – 1<sup>st</sup> October 2011;
- Explaining qualifying period of 12 weeks so the AWD would not affect short term assignments;
- Explaining that the AWD is not intended to change the employment status of the agency worker;
- Explaining who is and who is not included in the scope of the AWD (see the section entitled [Who is Included](#));

- Explaining what is included in terms of equal pay and equal treatment (see section entitled [What is Included](#));
- Explaining that BIS intend to produce formal guidance documentation and that you will share this with the client in due course.

Most clients will find it reassuring that their supplier understands the AWD and will work with them to implement it with minimum fuss, disruption and cost. This is a potential opportunity to bring your partnership with the client closer if handled well.

## A Possible Exemption

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The requirements of equal pay between agency workers and permanent employees of the hirer doing the same job may not apply where agency workers have a **permanent contract of employment with the agency and are paid between assignments**.

Draft regulations outline the circumstances under which such a contract should be permissible:

- The agency worker must have a permanent contract of employment with the agency;
- There is agreement at the outset between the agency and the worker on the terms & conditions that would apply across assignments;
- The contract must make clear that the agency worker is foregoing equal pay rights because they will be paid between assignments;
- The level of pay between assignments should be at least 50% of “on assignment” pay and not below the National Minimum Wage;
- The contract should not be capable of termination without the agency worker having received at least 4 weeks of pay between assignments;
- The agency must take reasonable steps to seek a suitable new assignment when one has come to an end. The agency worker should not unreasonably decline suitable assignments;
- The agency worker will qualify for statutory rights (e.g. the right not to be unfairly dismissed after 1 year and the right to statutory redundancy pay after 2 years).

### PLEASE NOTE

**This exemption only relates to equal pay. After 12 weeks the agency worker would still be eligible for equal treatment on other basic working conditions as identified above in the section entitled [Equal Treatment](#).**

Responsibility for Health & Safety of agency workers on permanent contracts of employment would remain as is current.

The maternity provisions detailed in the section entitled [Treatment for Pregnant Women](#), where a worker is suspended for health and safety reasons, apply for the length of the original intended duration of assignment or likely duration of the assignment - whichever is the longer. Once these provisions no longer apply - i.e. they wouldn't otherwise be performing original assignment - from that point the pay would be determined by the pay between assignments contract detailed in this section.

**Disclaimer**

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