



NIXONWILLIAMS

# GUIDE TO AGENCY WORKERS REGULATIONS



# Welcome

This aim of this guidance is to help with the understanding of the Agency Workers Regulations (AWR) legislation that came into force on 1st October 2011.

Note that the Agency Worker Regulations are not the same as The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Please refer to our separate Factsheet on this topic).

Firstly we need to establish who the Agency Workers Regulations apply to, these are:

- **Temporary Work Agency (TWA)** - individuals or companies involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer
- **Agency Worker** - individuals who work as temporary agency workers
- **Hirers** - the end user.

Contractors, freelancers and consultants who are in business on their own account will generally not be within the scope of the regulations.

## The Temporary Work Agency (TWA)

A temporary work agency (TWA) supplies agency workers to work temporarily for a third party (the hirer). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract with the TWA. Under the AWR a TWA is a person (individual or company) in business, involved in the supply of temporary agency workers. This could be an agency, but also an intermediary such as an umbrella company.

An individual is not prevented from being an agency worker under the AWR simply because they work through an intermediary body. For example, an individual working through an umbrella company, who finds work via a TWA, is covered by the AWR. The individual will usually have an overarching employment contract with the umbrella company with full employment rights and the employee's income generally being treated as employment income. However, that will not prevent the individual from benefitting from the AWR.

## Agency Worker

An agency worker is someone who has a contract with the TWA but works temporarily for and under the direction and supervision of a hirer. The relationship between agency worker, agency and hirer is a key feature of the AWR and who is covered by them.

The key elements required for someone to be an agency worker are:

- There is a contract between the worker and a TWA, that worker is temporarily supplied to a hirer by the TWA.
- When working on assignment the worker is subject to the supervision and direction of that hirer and the individual in question is not in a business on their own account.



## The Hirer

---

The hirer (end-user) is a 'person' - eg company, partnership, sole trader, public body - which is engaged in economic activity and which uses agency workers via a TWA. The hirer is responsible for supervising and directing the agency worker while they undertake the assignment.

## Rights

---

### Day 1 rights for all agency workers

Agency workers must have access to site facilities (such as canteen, childcare facilities, etc) and be able to access information on job vacancies from the first day of the assignment.

### After 12 weeks in the same job

The equal treatment entitlements relating to pay and other basic working conditions (annual leave, rest breaks etc) come into effect after an agency worker completes a 12 week qualifying period in the same job with the same hirer. After completing the qualifying period, pregnant agency workers will now be allowed to take paid time off for ante-natal appointments during an assignment.

It is not retrospective and for those agency workers already on assignment, the 12 week qualifying period will start from 1 October 2011.

### What this means for:

---

#### Temporary Work Agency

If you are involved in the supply of temporary agency workers, you need to ask the hirer for information about pay and basic working conditions (when it is clear that the agency worker will be in the same job with the same hirer for more than 12 weeks) so that they are treated as if they had been directly recruited to the job.

#### Temporary Agency Workers

From 1 October 2011, after you have worked in the same job for 12 weeks, you will qualify for equal treatment in respect of pay and basic working conditions. You can accumulate these weeks even if you only work a few hours a week. Your temporary work agency is likely to ask for details of your work history to help establish when you are entitled to equal treatment.

#### Hirers of Agency Workers

If you are an employer and hire temporary agency workers through a temporary work agency, you should provide your agency with up to date information on your terms and conditions so that they can ensure that an agency worker receives the correct equal treatment, as if they had been recruited directly, after 12 weeks in the same job. You are responsible for ensuring that all agency workers can access your facilities and are able to view information on your job vacancies from the first day of their assignment with you.

## Exemptions

There are only two exemptions to the Agency Worker Regulations:

- Where the status of the hirer or agency is that of a client or customer of a professional service.

A professional is normally someone who is certified by a professional body such as a doctor, accountant or a lawyer. Normally a professional providing services to a client or customer is not working under that person's supervision or direction.

- Where the agency worker is in business on their own account.

Contractors and freelancers operating through their own limited company and are genuinely in business on their own account will generally be out of the scope of the Agency Worker Regulations.

Although IR35 is part of tax legislation and AWR is employment legislation, if the contractor is outside IR35 then it is highly likely that the contractor will also be outside of the AWR. Please refer to our Guide to IR35 for more details.



## Benefits

---

Having completed the 12 week qualifying period, the agency worker is entitled to the same basic terms and conditions that he or she would have received if recruited directly. This includes terms and conditions relating to key elements of pay. Pay for these purposes means sums of money paid to the worker in connection with the worker's employment.

This guide explains what is included and excluded in the definition of 'Pay'.

### **Pay Includes:**

---

- Basic & overtime pay based on the annual salary an agency worker would have received if recruited directly
- Shift/unsocial hours allowances, risk payments for hazardous duties
- Payment for annual leave (any entitlement above the statutory minimum of 28 days can be added to the hourly or daily rate)
- Bonus or commission payments directly attributable to the amount or quality of the work done by the individual.
- Vouchers which have monetary value and are not 'salary sacrifice schemes' - e.g. child care vouchers

### **Pay Excludes:**

---

- Occupational sick pay, maternity, paternity or adoption pay (the agency worker is however, entitled to statutory payments)
- Occupational pensions although agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012
- Redundancy & notice pay (statutory and contractual linked to loss of employment)
- Advances in pay or loans e.g. for season tickets
- Expenses such as accommodation and travel expenses
- Payments or rewards linked to financial participation schemes such as share schemes
- Overtime or similar payments where the agency worker has not fulfilled qualifying conditions required of someone directly recruited. For example, an agency worker would have to be doing work over and above standard hours to qualify for overtime, not just working a shift that permanent staff tend to work on an overtime basis
- The majority of benefits in kind, although 'cash' benefits such as childcare vouchers are included
- Any payments that require an eligibility period of employment/service, if not met by the agency worker or if the agency worker is no longer on assignment when the bonus is paid
- Bonuses which are not directly linked to the contribution of the individual

## **Pay between Assignments**

---

There is an exemption from equal treatment provisions on pay where a TWA can offer an agency worker a permanent contract of employment and pay the agency worker between assignments i.e. during the periods when they are not working when there are no available suitable assignments for the agency worker. 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.

The TWA should explain this to the agency worker so they can make an informed decision as to whether they are willing to agree to forgo this entitlement and enter into a permanent contract with them. In any event, the contract of employment has to contain a statement to the effect that entering into such a contract means that the agency worker does not have any entitlement to equal pay as set out in the regulations.

The rate of pay between assignments must be at least 50% of on assignment pay, at least National Minimum Wage and calculated using a reference period. The reference period is usually the 12 weeks immediately preceding the period of pay between assignments.

## **Permanent contract of employment**

---

To qualify for this exemption, the agency worker must be given a permanent contract of employment with the TWA and agree the terms and conditions that will apply across assignments and the level of pay between these assignments. There is no requirement to pay the agency worker before the first assignment under the contract has begun.

These contracts must comply with the requirements in the reg certain specified conditions such as:

- Minimum pay rates and their basis of calculation
- Location of work, reflecting where the agency worker is willing to travel
- Minimum and maximum expected hours (e.g. an agency worker may only be available for 4 days per week so a 5 day assignment would not be 'reasonable')
- Nature of work
- A statement that makes clear that the agency worker is foregoing entitlements to equal treatment in so far as they relate to pay
- Pay between assignments must be at least 50% of assignment pay based on previous 12 weeks and not below the National Minimum Wage and such pay is calculated at the highest pay rate and hours enjoyed in the course of the previous 12 weeks.



## **Anti avoidance measures**

---

The Regulations refer to contracts of greater than 'one hour' per week in order to demonstrate that providing a 'zero hours' contract will not meet the requirements of the derogation contract.

The pay between assignments derogation is designed to be used where an agency worker has a contract of employment with a TWA and is paid during the weeks when the worker is not assigned to a hirer. It is because of this pay, when the worker is not assigned, that the Regulations provide for the derogation from equal treatment on pay. TWAs and hirers should not structure arrangements in a way that deprives agency workers of the protection provided by pay between assignments. This could put them at risk of a legal challenge.

If there is no permanent contract of employment between the TWA and agency worker which complies with the requirements of the derogation then the agency worker could be entitled to the equal treatment provisions under the Regulations. In the event of a successful claim, the TWA (and/or the hirer) will be responsible for any breach (and associated penalties) to the extent that they are responsible for the infringement.

## **Rate of pay between assignments**

---

The agency worker will need to receive at least 4 weeks of pay between assignments (at the 50% rate or at least NMW) before the contract can be terminated. The agency must take reasonable steps to find a suitable assignment and where it does this, the agency worker will not be able to complain of a breach of the agreement or allege that a right to equal treatment on pay.

## **A suitable offer of work**

---

From the outset, and before the first assignment, the TWA and agency worker will need to discuss, agree and note in a written contract what the agency worker is willing to accept on any particular assignment. If an agency worker refuses a suitable assignment then, depending on the circumstances and the contract between the agency worker and the TWA, the agency worker may not be available for work and therefore not entitled to receive pay between assignments.

## **Ending a pay between assignments contract**

---

If the TWA wants to terminate the contract it must first satisfy the requirement for the TWA to give 4 weeks pay to the agency worker. The 4 weeks pay must be paid before the TWA can terminate the contract.

## **Umbrella companies and the AWR**

---

Contractors who work through umbrella companies will generally be caught by the AWR, as they would find it impossible to demonstrate that they are in business on their own account, as they do not own a stake in the umbrella company.

Umbrella contractors who can clearly demonstrate that they do not work under the direction and supervision of the hirer may be outside the scope of the AWR.

Umbrella companies appear to have decided to opt for one of the following options, or even a mixture of them, although it seems unlikely that umbrella companies will exist as we know them in a few years time.

## **Swedish Derogation**

---

Umbrella contractors will be excluded from the right to equal pay if the umbrella uses the 'Swedish Derogation' model.

Several of the umbrella companies have announced that they will offer the 'Swedish Derogation' model to their clients and contractors. In our view, the 'magic' solution of the 'Swedish Derogation' model has some major flaws. To fund an effective 2 weeks pay for contractors who are out of contract will be very expensive, it is the elephant in the room that no-one wishes to bring up.

Time will tell who will pay for this, be it the umbrella company, the agency, the end client or the worker themselves. Umbrella company margins probably mean that they will be unable to fund this pay from their current fees. Agencies will probably strongly resist a reduction in their margin and end clients will also resist an increase in their costs, especially as this could probably be avoided if the worker operated through their own limited company.

So that leaves the worker at the end of the line and, most probably the person who will have to foot the bill if they continue to work through an umbrella company.

The worker will effectively receive less pay over the period of the contract if they use an umbrella operating a 'Swedish Derogation' model. This is because the umbrella company will have to hold back enough funds to pay for the 'out of contract' pay.

One or two umbrellas have suggested that they will treat each contractor like an insurance company would, and assess the risk of the contractor not being able to move to another contract straight after the previous one has ended. The problem with this is that who will end up paying the insurance premium?

## Matched Permanent Pay

---

Matched Permanent Pay (MPP) will prove to be an expensive option and in reality will probably only be used for lower paid agency workers.

## Limited Company

---

We have already seen some umbrella companies trying to move their contractor clients to a limited company option. Since the start of AWR we have seen more limited company formations by the accounting arms of the larger umbrella companies.

## Do Nothing!

---

It goes without saying that this is clearly to be avoided. If the umbrella company that you deal with has not yet communicated with you about your options, you should be actively considering changing your umbrella provider or indeed if you are a contractor, you should consider your trading options.

## Summary

---

We hope that you have found this brief guide useful in helping you understand the Agency Worker Regulations. The AWR are destined to shake up the use of temporary workers at all levels, whether it is as the end user, an agency or the worker themselves.

Nixon Williams are here to help and assist you with any concerns or questions that you may have, please do not hesitate to contact us should you have any further questions.

**Disclaimer** - For information of users - This briefing is published for the information of clients. It provides only an overview of the regulations in force at the date of publication, and no action should be taken without consulting the detailed legislation or seeking professional advice.

Therefore no responsibility for loss occasioned by any person acting or refraining from action as a result of the material contained in this briefing can be accepted by the authors or the company.

# PREMIER SERVICE SUMMARY

## what is included?



### Set Up

---

- Form a Limited company at Companies House.
- Register your company for PAYE.
- Register your company for VAT.
- Register your company for Corporation Tax.
- Register your company for the VAT Flat Rate Scheme.
- Assist with opening a HSBC or Cater Allen Bank Account

### Monthly

---

- Operate your payroll with payslips for each employee.
- Calculate and issue a profit statement for your company.

### Quarterly

---

- Calculation & advice of VAT returns & payments.
- Calculation & advice of PAYE payments.

### Annually

---

- Issue and file P14's/P60 & P35 with HMRC.
- Issue and file P11d & P11d(b) with HMRC.
- Calculate and advise of Class 1A NIC payments.
- Prepare & file annual accounts with HMRC.
- Prepare & file Corporation Tax return (CT600) with HMRC.
- Prepare accounts for Companies House.
- Prepare Companies House Annual Return (AR01).
- Personal Tax Return for one person if received by 30th September after the end of the tax year. A small charge may apply if you join part way through the tax year.

### Ongoing

---

- Dedicated Account Controller including their direct phone number & email address.
- Unlimited telephone & email support.
- Ongoing book-keeping.
- Produce dividend vouchers and board minutes.
- Deal with any general HMRC correspondence and queries.
- Advise Companies House of company changes.
- Deal with change of address for the company and director.
- Mortgage and tenancy references.
- Complete National Statistical Office questionnaires.
- Deal with HMRC investigations where we have done the work, provided you have followed our advice and not concealed anything from us.
- If you decide to cease using our services, your only commitment is to give us one month's notice.
- If you choose to move to another accountant, we do not make a charge for the transfer.

### Your obligations to us:

---

- Send us copies of your invoices.
- Send us your expense claim form.
- Send us a copy of your company bank statements.
- Respond to letters and emails from us.
- Pay our fees each month.

All Inclusive  
Service for only  
**£95 + VAT**  
per month



NIXONWILLIAMS

**Nixon Williams Limited**

4 Calder Court,  
Shorebury Point,  
Amy Johnson Way,  
Blackpool,  
Lancashire  
FY4 2RH

**Telephone:** 01253 362000

**Fax:** 01253 362001

**Email:** [info@nixonwilliams.com](mailto:info@nixonwilliams.com)