



## What is AWR?

The agency Workers Regulations (AWR) came into force in October 2011. AWR's aim was to ensure that temporary workers were protected by applying the principle of equal treatment. In particular it ensures that the basic working and employment conditions of the agency worker should be at least those that would apply if the candidate had been directly employed by the hirer to work in the same or broadly similar job.

## How equal treatment is established

Deciding what "equal treatment" means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job.

Equal treatment is not required in respect of all the terms and conditions that the person would have received had they been recruited directly. It covers basic working and employment conditions. They are those which are ordinarily included in relevant contracts (or associated documents such as pay scales, collective agreements) of direct recruits. This means terms and conditions normally set out in:

- Standard contracts;
- A pay scale or pay structure;
- A relevant collective agreement;
- A company handbook or similar

It would not apply if there were genuinely no 'basic working and employment conditions' that apply generally. In most cases equal treatment can be simply established by giving the same relevant entitlements "as if" he/she had been recruited as an employee or worker to the same job, i.e. what pay and holidays would he/she would be to, given a particular role and his/her particular skills and qualifications.

Some equal treatment will apply from day one, other commence after 12 weeks

## Day 1 rights for all agency workers:

If you hire agency workers, you must ensure that they can access your **facilities**. These will mean amenities such as:-

- a canteen or similar and food and drink machines
- child care facilities
- transport service (local pick up and drop off, or transport between sites – it does not mean company car allowances or season ticket loans)
- shower facilities
- staff common room
- mother and baby room
- prayer room
- car parking
- on site gym

This is a non-exhaustive list and does not have to include facilities which might be considered part of a package to reward long term service or loyalty.

AWR does not mean that an agency worker will be given enhanced rights, for example, where child care facilities or car parking spaces have a waiting list; the agency worker is also entitled to join the list.

AWR also does not include off-site facilities or benefits such as a subsidised gym.

You must also ensure that a temporary worker can access **information on your job vacancies** from the first day of their assignment with you.

### **After 12 weeks in the same job:**

The equal treatment entitlements for temporary workers relate to **pay** and other **basic working conditions** (annual leave, rest breaks etc.) and come into effect after an agency worker completes a **12 week qualifying period** in the same job with the same hirer.

Pay includes:

- basic pay based on the annual salary an agency worker would have received if recruited directly, usually converted into an hourly or daily rate
- overtime payments
- shift allowances
- payments for annual leave where your company standard is above the statutory minimum of 5.6 weeks per year (fte)
- bonuses or commission payments directly attributed to the amount and quality of work done by the individual, including where targets achieved and payments relate to quality of personal performance
- vouchers or stamps where they have a monetary value, such as child care vouchers or luncheon vouchers

Pay does not include:

- occupational sick pay
- occupational pensions (agency workers will be covered by new automatic pension enrolment which will be phased in from October 2012 – see website for more details [www.dwp.gov.uk/policy/pensions-reform](http://www.dwp.gov.uk/policy/pensions-reform))
- occupational maternity, paternity or adoption pay
- redundancy pay
- notice pay
- guaranteed payment if you are laid off
- payment for time off for Trade Union duties
- advance in pay or loans e.g. for season tickets
- accommodation and travel expenses
- payments or rewards linked to financial participation schemes such as share ownership schemes
- overtime or similar payments where an agency worker has not fulfilled the qualifying conditions that a permanent member of staff would have to fulfil
- any payments that require an eligibility period of employment/service
- bonuses which are not directly linked to the contribution of the individual e.g. a flat rate bonus that is given to all direct recruits to encourage loyalty or long term service
- additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice, such as a Christmas bonus

- bonuses of any kind paid to permanent staff after the agency workers posting has ended (unless a permanent member of staff leaving at the same time as the agency worker would receive a retrospective payment)

After an agency worker completes a 12 week qualifying period with the hirer they are entitled to the same basic terms and conditions of employment as if they had been employed directly by the hirer.

They are;

- **duration of working time** e.g. if working is limited to a maximum of 48 hours a week
- **night work**
- **rest periods**
- **rest breaks**
- **annual leave**

In addition, pregnant agency workers who have completed the 12 week qualifying period, will be entitled to **paid time off for ante natal appointments**

For any entitlement requiring a period of service – e.g. enhanced entitlement to annual leave after 12 months – the period starts at the time the qualifying period commenced (not 12 months and 12 weeks but 12 months).

## Calculating the 12 week qualifying period

The 12 week qualifying period is **triggered by working in the same job with the same hirer for 12 calendar weeks**. A calendar week in this context will comprise any period of seven days starting with the first day of an assignment.

Calendar weeks will be accrued regardless of how many hours the worker does 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 calendar weeks calculated in this way.

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

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 Temporary Work Agency over the course of that period of time.

Hirers should also be aware of the anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the qualifying.

## The Qualifying Clock

The working patterns of agency workers can be irregular. The Regulations therefore provide for a number of circumstances in which breaks do not prevent agency workers from completing the qualifying period.

These provisions can best be explained by thinking of the qualifying period as a clock which runs from 0 to 12. Sometimes a gap between assignments – or a move to a new assignment - will mean that the clock is reset to 0 and must start again. In other circumstances a break will merely ‘pause’ the clock which will then continue to tick when the agency worker returns. In some limited circumstances, the clock will continue to tick even if the agency worker is not working on an assignment.

## Reasons for the qualifying clock to reset to zero;

- Most commonly it will be because an **agency worker begins a new assignment with a new hirer**
- Where an **agency worker remains with the same hirer but is no longer in the same role.**
- If there is a **break between assignments with the same hirer of more than 6 weeks** (which is not one which 'pauses' the clock or during which it continues to 'tick')

## Types of break that will cause the qualifying clock to 'pause';

- A break for **any reason** where the break is **no more than six calendar weeks** and the agency worker returns to the same role with the same hirer
- A break of up to 28 weeks because the agency worker is incapable of work because of **sickness or injury**
- Any break which is for the purpose of **taking leave** to which the agency worker is entitled, including annual leave
- A break up to 28 calendar weeks to allow the agency worker to perform **jury service**
- A break caused by a **regular and planned shutdown** of the workplace by the hirer (for example at Christmas)
- A break caused by a **strike, lock out or other industrial action** at the hirer's establishment

## Breaks where the clock continues to tick

- Breaks due to **pregnancy, childbirth or maternity** which take place during pregnancy and up to 26 weeks after childbirth.
- Any breaks due to the worker taking **maternity leave, adoption leave or paternity leave.**

In each of these cases the clock will continue to tick for the originally intended duration of the assignment, or the likely duration of the assignment (whichever is longer).

## Definition of 'new' hirer

The qualifying clock will be reset to zero if the agency worker stops working for one hirer and begins working for another.

Generally such situations will be clear. A new hirer for this purpose must be a different legal entity. Where a single hirer has multiple sites, merely moving the worker from one site to another will not usually break continuity (unless it is a substantively different role).

Where a hirer is part of a larger group and each company has its own legal identity, then the qualifying period will restart when an agency worker moves between the different legal entities.

However, hirers and should be aware of the anti-avoidance provisions which prevent a series of assignments from being structured in such a way as to prevent the worker from completing the qualifying period. These provisions would cover, for example, the situation where an agency worker is moved back and forth across a group where there is common ownership via holding companies and subsidiaries and the intention is to deprive the agency worker from receiving equal treatment.

## Substantively different

If there is a substantive change to a job role within the same hirer, a new qualifying clock commences for the new role. **However, for this to happen, the work or duties which make up the whole or main part of a role must be substantively different;** it is not enough that a line manager has changed but not the job requirements or that the agency worker has transferred between similar administrative functions or has moved within a single, relatively small business unit or

has been given a different pay rate. None of these things by themselves would be sufficient. There has to be a genuine and real difference to the role.

## **The factors that may make the work or duties substantively different**

In the event of a dispute, a combination of factors can be expected to be taken into account when establishing whether or not the work or duties are substantively different.

### **A combination of the following characteristics can help to establish if the work or duties are substantively different;**

- Are different skills and competences used?
- Is the pay rate different?
- Is the work in a different location/cost centre?
- Is the line manager different?
- Are the working hours different?
- The role requires extra training - and/or a specific qualification that wasn't needed before?
- Is different equipment involved?

## **12 week assignments and anti-avoidance provisions**

A hirer can obviously decide not to engage agency workers beyond the 12 week qualifying period. There is nothing in the Regulations to prevent an agency worker being released after say 11 weeks or for assignments of 12 weeks to be the usual practice of any hirer. However, hirers should be aware of anti-avoidance provisions which address any situation where a pattern of assignments emerge that are designed to deliberately deprive an agency worker of their entitlements.

## **Comparators**

The hirer will be deemed to have complied with the Regulations on equal treatment on basic working and employment conditions if the hirer identifies an appropriate comparator and treats the agency worker in the same manner. In these circumstances the comparator must be an employee.

A comparator needs to be engaged in broadly similar work, but account can be taken of their skills and qualifications as this may justify a higher level of pay for the comparator. They must work at the same or, if there is no comparable employee in the same workplace, in another of the hirer's workplaces. They will not be a comparable employee if they are no longer employed by the hirer.

## **Some examples**

### **Where a hirer has pay scales or pay structures**

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.*

### **Where there are no pay structures**

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 employees are paid between £8-10 per hour— those recruited most recently being paid £8 per hour, 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 at that rate after 12 weeks. Is this allowed?

*Answer: No; there is clearly a rate of at least £8 for the job and the agency workers would be entitled to at least this after 12 weeks on the assignment.*

### **Where there are no pay scales or structures or comparable permanent employees**

A company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same 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, or 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 should be entitled to the same treatment on these points*

### **All directly recruited terms individually negotiated**

A 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.**

### **Bonuses linked to individual performance**

There are many different types of bonus or commission payments. The question when deciding whether an agency worker qualifying for equal treatment is entitled to any such payment is whether it is directly attributable to the work which that worker has done.

Examples of payments **to which an agency worker would be entitled to would include:**

- commission payments linked to sales;
- bonuses payable to all staff who meet a specific individual performance target e.g. calls handled in a time given;
- bonuses paid to all staff who consistently respect company standards or values;
- bonuses payable on the basis of individual performance over a given period, e.g. a reporting year

**Examples of payments to which an agency worker would not be entitled would include:**

- bonuses reflecting the overall performance of the business
- bonuses reflecting the overall performance of the part of the organisation where the agency worker has worked , but to where the agency worker has only made a minimal contribution

### **Information required at the start of every temporary assignment**

- the identity of the hirer, nature of business and locations of work
- start date and duration of assignment
- job role, responsibilities and hours
- the experience, training, qualifications the hirer considers are necessary, or which are required by law, or by any professional body in order to work in the position
- any risks to health or safety known to the hirer and steps taken to prevent or control such risk
- any expenses payable by or to the worker
- the level of **basic pay** (based on the annual salary)

As the entitlement to equal treatment begins in week13, additional information should be provided promptly – when it is clear that the assignment will last more than 12 weeks. This should include:

- **overtime payments** and **shift/unsocial hours** allowances or **risk payments for hazardous duties**
- types of **bonus** schemes the hirer operates (and how individual performance is appraised and information on annual pay increments)
- if they offer **vouchers** which have monetary value
- **annual leave entitlement**

If you have any questions relating to any of the information highlighted about, or anything else relating to AWR, then please contact SimkissGuy on 0121 262 4070.