

Fact sheet for candidates from Unique Employment - September 2011

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1. Background

From the 1 October 2011, the Agency Workers Regulations 2010 (the Regulations) will give agency workers working in England, Scotland and Wales the right to receive the same basic working and employment conditions as they would have received had they been recruited directly to do the same job with the same hirer. Agency workers will be entitled to these rights after having worked in the same role for 12 calendar weeks, since the 1st October 2011 with the same hirer.

However, from the first day of an assignment agency workers will also be entitled to access on-site collective facilities provided by the end user hirer to its own workers and to be advised by the hirer of vacancies which arise within the hirer's business. These are also referred to as 'Day One rights'.

2. Am I an agency worker?

The Regulations refer to an agency worker as:

- an individual;
- who is supplied by a temporary work agency to work temporarily under the supervision and direction of a hirer; and who
- has a contract of employment with the agency, or any other contract with the agency to perform work or services personally.

You will not be an agency worker if:

- you have found a permanent job (even if this is via an agency); or
- you are genuinely self-employed (i.e. in business on your own account).

If you are an agency worker, you cannot opt out of the Regulations.

3. What if I work through an umbrella company?

If you are engaged via an umbrella company or other intermediary you will still be deemed to be an agency worker under the Regulations unless you are genuinely self-employed.

4. What do you mean by Day One rights?

From day one of an assignment, as an agency worker, you will be entitled to the following two rights:

i. The right to access information on job vacancies

The client you are working for (also known as the "hirer") must inform you of any relevant job vacancies in their organisation and ensure that you have the same access as other workers to the information available. This does not mean that you will automatically have the right to be employed by the hirer; you must follow the usual recruitment process that they use. (This does not apply in the situation where the hirer has a freeze on external job advertisements where any vacancies are held for internal moves in order to prevent potential redundancies).

ii. The right to access collective on-site facilities

You will also be entitled to access collective on-site facilities such as crèche and childcare facilities, canteen facilities, car parking and the provision of transport services that are provided to the hirer's own workers.

This access to facilities can be refused if your hirer has 'objective grounds' for doing so. In practice this means that if there is a waiting list for childcare facilities or a car park space, you will not automatically be entitled to a place but can be subject to the same criteria to access the facility as someone directly recruited by the hirer. You will not be entitled to 'amenities' such as subsidised gym membership and season ticket loans as they are considered to be a reflection of the long-term relationship between an employee and a hirer.

The hirer has sole responsibility for ensuring that you receive these Day One rights.

5. What do you mean by 'the same basic working and employment conditions'?

On completion of the 12 week qualifying period, as an agency worker you will be entitled to equal treatment in respect of basic working and employment conditions relating to:

- pay;
- duration of working time;
- night work;
- rest periods;
- rest breaks; and
- annual leave.

Equal pay will include:

- basic salary;
- bonuses or commission payments related to the quantity and quality of work carried out by you;
- shift allowance;
- overtime payments;
- holiday pay; and
- vouchers (e.g. luncheon vouchers, providing they have a fixed monetary value and are not part of a salary sacrifice scheme).

Equal pay does not include:

- benefits in kind;
- vouchers which are a salary sacrifice arrangement between an employer and an employee;
- pension payments (temporary workers will be entitled to a pension under separate legislation due to come into effect in 2012);
- occupational sick pay;
- redundancy pay;
- notice pay;
- advances and loans;
- share and option schemes;
- maternity, paternity and adoption pay (over and above the statutory entitlement);
- loyalty bonuses or any bonus payments which are not directly attributable to the amount or quality of the work performed by you;
- guarantee payments;
- expenses; and
- health/life insurance.

Holiday entitlement – As an agency worker you are already entitled to the statutory leave entitlement of 28 days (pro-rata'd). If you qualify for equal treatment you will also be entitled to any additional holiday entitlement the hirer provides to direct recruits. The additional entitlement may be rolled up and paid in lieu of taking the time of or we will pay the additional holidays as and when they are taken. This will be discussed with you on a Client by Client basis.

6. Pregnant agency workers

If you are a pregnant agency worker you will be entitled to paid time off to attend pregnancy related medical appointments and antenatal classes once you achieve the 12 weeks' qualifying service. You will need to show the agency your appointment card or other proof of appointment (except for the first appointment).

In addition, if an assignment is terminated on pregnancy related health and safety grounds the agency will have to find you suitable alternative work on terms which are not substantially less favourable than the previous assignment. If the agency cannot find you suitable alternative work the agency will be required to pay you for the remainder of the original assignment. If you unreasonably refuse suitable alternative work you will not be entitled to such pay.

7. How will I qualify for equal treatment after 12 calendar weeks?

After you have worked for 12 calendar weeks, starting October 1st, in the same role with the same hirer you will be entitled to equal treatment irrespective of your working pattern (e.g. full time or part time) and irrespective of which or how many agencies supplied you to do the same role at the hirer.

Any time worked during a week will be counted as 'one week' for the purposes of calculating the qualifying period even if you have only worked a few hours in a week.

For example – if you start an assignment on the Saturday, any work done up to and including the following Friday will be counted as one week towards the qualifying period.

A new qualifying period will begin only if a new assignment with the same hirer is substantively different (and that does not mean simply changing a job title; it will mean looking at the work and duties performed), or if there is a break of more than six weeks between assignments in the same role (except in certain limited circumstances).

8. What if I want/need to take some time off work, will this mean I have to start my 12 week qualifying period again?

The qualifying period will be paused (rather than stopped) if you take:

- a break (for any reason) of 6 weeks or less and then return to the same role with the same hirer;
- certified sick leave for no more than 28 weeks;
- time off during periods where the hirer does not require you to work because of various types of industrial action;
- time off during periods when the hirer has temporarily closed down (e.g. Christmas shut down); or
- time off for public duties (including jury service of up to 28 weeks).

In other cases if you take a break which is related to pregnancy or childbirth, or if you take maternity, adoption or paternity leave, you will be treated as if you have continued working in an assignment.

It is clear that as an agency worker you will not have to work for 12 consecutive weeks via the same agency to qualify for the right to equal treatment. It is possible for you to accrue the 12 weeks' qualifying period over a much longer period of time and through more than one agency.

9. What if I've already worked for the same hirer for 12 weeks when the Regulations come into force in October?

The Regulations are not retrospective. Therefore any time spent on an assignment up to and including 30 September 2011 will not count towards your qualifying clock. The earliest date you can qualify for equal treatment is 25 December 2011 subject to any breaks you take.

10. If I have already worked for the hirer previously, do I have to inform the agency of this?

Your agency may ask you to give them details of previous assignments that you have completed. If they do so, you are not under a statutory obligation to provide them with such information, but if you do not, they will not be able to ensure that they provide you with equal treatment rights. Also, please be aware that if you do not provide them with the correct information this may affect any Employment Tribunal claim you may issue and any subsequent compensation you may seek.

11. What if I work for two different hirers at the same time i.e. one for two days a week and the other for three?

This would mean that you will have two qualifying clocks running at the same time and you will qualify for equal treatment with each of the hirers after working 12 calendar weeks for them (this is only the case if the two roles are different).

12. How will I know if I am being treated the same as I would have been if I had been recruited directly by the hirer?

The Regulations require that as an agency worker you are treated as if you had been recruited directly by the hirer to do the same job. On a practical level, this means that equal treatment will need to be established in respect of the basic terms and conditions that apply to a comparable worker or a comparable employee engaged in the same role or doing broadly similar work taking into account the skills and qualifications of yourself and the comparable employee/worker. The comparable employee or worker must work at the same establishment as you or at another of the hirer's establishments.

There may be a direct recruit who could serve as a 'flesh and blood' comparator to establish parity in pay and working conditions. However, if a 'flesh and blood' comparator cannot be found, then there may be an identifiable pay scale or a starting rate which the hirer and agency can use as a reference point.

13. What if I feel my agency is giving me shorter assignments just so that I don't reach the 12 week qualifying period?

The Regulations contain anti-avoidance measures to prevent agencies and hirers from structuring assignments in a way so as to prevent you from reaching your 12 week qualifying period. This includes – supplying you to connected hirers, rotating you and other agency workers, or repeatedly terminating and recommencing assignments where the most likely explanation is to prevent you from accruing the 12 weeks' qualifying period. If an Employment Tribunal finds that the Regulations have been deliberately avoided, the Tribunal can award you compensation of up to £5000. However, this does not prevent agencies and hirers terminating and commencing assignments as and when required to meet a genuine business need.

14. Are there any situations where my agency will not have to provide me with equal treatment?

The Regulations contain an exemption from equal treatment after 12 weeks in respect of pay only if you are employed by the agency on a particular contract of employment. In order to make use of the exemption that contract must meet certain conditions. In particular, the agency will be required to pay you a minimum amount between assignments if the agency cannot find suitable alternative work for you. If you refuse suitable alternative work, the agency will not be obliged to pay you between assignments. Your agency will not be able to terminate your contract of employment until it has met the obligations above for at least four weeks during the course of the contract.

You will still be entitled to equal treatment in respect of working conditions and to the Day One rights discussed above.

The minimum amount of pay that the agency must pay you when not working must be at least 50% of the pay paid to you in the "relevant period" and this must not be less than National Minimum Wage. The relevant period is the week or month in which you had your highest earnings in the 12 weeks prior to the date the previous assignment ended.

If your agency offers you a permanent contract of employment, your contract must meet the following conditions in order for your agency to utilise the exemption from equal pay:

The contract must commence before the assignment starts and must contain the following terms:

- the minimum scale and rate of pay you will receive and how this will be calculated;
- the location(s) where you will be expected to work;
- the expected hours of work during any assignment;
- the maximum hours per week that you may be required to work during an assignment;
- the minimum hours per week that your agency will offer you during an assignment (this must be at least one hour);
- the type of work that your agency will offer you and details of any qualifications or experience required; and
- a provision that warns you that by entering into the contract of employment you will not be entitled to equal pay under the Regulations.

15. What should I do if I think that I am not receiving equal treatment that I believe I am entitled to?

If you have completed the 12 week qualifying period and if you believe that you are not receiving the equal treatment that you feel you should be getting, we suggest that you make an informal enquiry to the agency to find out if this has happened and if so why it has happened. It may be, for example, that you have not yet completed the qualifying period or the agency has made a mistake which can easily be rectified. If you do not receive a satisfactory response you are entitled to make a request for a written statement from your agency that will provide you with information about the treatment you have received. You can make a written request to the agency which will then have 28 days to respond in writing. If you do not receive the information from the agency within 30 days of making the request, you can make a request directly to the hirer. If you do not receive a response from the agency or the hirer, an Employment Tribunal may take this into account in any future tribunal claim against the party at fault.

16. Who should I complain to if I have an issue?

There will be no independent body tasked with policing and enforcing the Regulations. Instead you will be able to pursue a claim in an Employment Tribunal in order to enforce your rights. Such claims can either be brought against the hirer the agency or both depending on the particular breach in question. The Employment Tribunal will analyse the facts to determine to what extent each party is responsible for the breach of the Regulations. We recommend that you try to resolve the issue informally before making an Employment Tribunal claim.

17. When will I get information on the equal treatment for the hirer that I am working for?

We envisage that we will be sending out factsheets with all the new terms for our current clients in November outlining all the additional entitlements you will be entitled to after 12 weeks have been completed.

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It is not a substitute for legal advice on related matters and issues that arise and should not be taken as providing specific legal advice on any of the topics discussed.