

AUTUMN 2011

Agency Workers Regulations 2010: Prepare Now To Ensure Compliance Later

The Agency Workers Regulations 2010 (AWR) will come into force on 1 October 2011. If your business uses agency workers or “temps” and will continue to do so post 1 October 2011, it is important to take action now to avoid future costs and disputes.

Essentially AWR will provide agency workers with the entitlement to the same basic employment conditions as permanent employees with the same employer after a qualifying period of 12 weeks in the same job. The definition of “agency worker” is vague under AWR, but it is likely to cover temps and various other types of worker, such as contractors.

Workers, who complete 12 weeks on the same job, will thereafter be entitled to equality in areas such as the following, unless the employer can objectively justify otherwise:

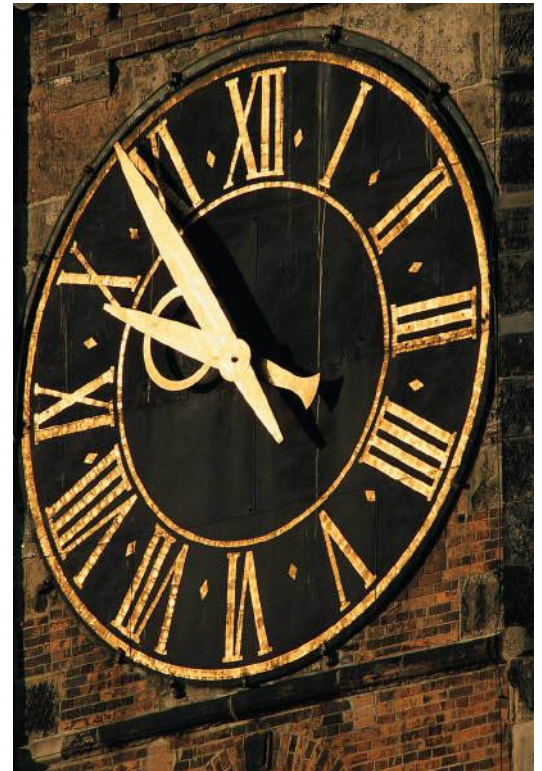
- Pay;
- Working hours and overtime;
- Bonuses related to individual performance;
- Annual leave;
- Paid time off to attend ante-natal appointments;
- Equal access to training and collective facilities (e.g. childcare or transport services);
- Information on permanent job vacancies.

There are various factors which are taken into account when calculating the 12 week qualifying period. Some periods of leave pause the clock (e.g. sickness of up to 28 days or holiday) whereas, if there is a break in the engagement of six weeks or more or if the worker undertakes a different assignment for the same employer, that resets the clock. However it should be noted that the qualifying period is not paused or broken if the circumstances are related to maternity or paternity rights.

AWR makes it clear that the 12 week qualifying period is not retrospective, so workers will only start to accrue the qualifying period from 1 October 2011, even if they are engaged with the employer before that time.

Additionally AWR contains anti-avoidance provisions which will allow workers to bring certain employment tribunal claims if they consider their “employment” to be structured in a way which falls foul of AWR. If a claim succeeds, the employment tribunal may award unlimited compensation, taking into account the losses suffered by the worker and their assessment of what is just and equitable.

Employers should therefore carry out an impact assessment of their workforce, ensure contracts and policies are properly updated, and compile the information employment agencies will require. In addition monitoring processes should be implemented to protect the business from potential claims.



Using Compromise Agreements



Terms requiring a compromise agreement to be signed in order for an employee to benefit from an enhanced redundancy package do not need to be expressly stated in an employment contract – they can be implied. This was confirmed in *Geoffrey Garatt v Mirror Group Newspapers Limited 2011*.

This decision may be useful in persuading an otherwise reluctant employee to sign a compromise agreement to guarantee their enhanced redundancy package and overall to achieve a clean break on redundancy.

Update: Bribery Act 2010 Now in Force

Further to our article in the  Spring Update, the Bribery Act 2010 came into force on 1 July 2011.

It should be noted that if an individual is convicted of bribery, they may receive a prison sentence of up to ten years, a fine, or both.

If a company or partnership is convicted, the company, its directors and partners could all be subject to criminal sanctions. This may involve a fine of an unlimited amount to be paid from the business' assets. In addition, public authorities may have discretion to exclude such organisations from public contract tenders.

Companies will be able to protect themselves from liability for bribery offences if they can prove "adequate procedures" are in place, designed to prevent anyone related to that business from committing bribery.

For full details as to how Slee Blackwell can assist in protecting you and your business, see our full article at www.sleeblackwell.co.uk.



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Should you have any queries relating to the information that you have read in this update please do not hesitate to contact one of our employment law specialists, either by telephone or via email as detailed below.

legal protection for employers

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Increase of National Minimum Wage

The National Minimum Wage (Amendment) Regulations 2011 come into force from 1 October 2011.

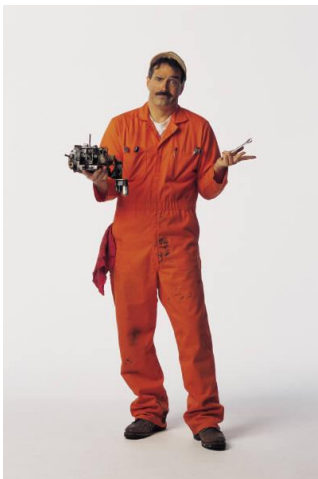
This means that the minimum hourly rates to be paid to workers will be effected as follows:

- Workers aged 21+: £5.93 increases to £6.08
- Workers aged 18 to 20: £4.92 increases to £4.98
- Workers aged 16 to 17: £3.64 increases to £3.68
- Apprentices: £2.50 increases to £2.60



(Self) Employment Status

If an “employee” acts like an employee and sounds like an employee, he is probably not a self-employed subcontractor. The Supreme Court’s decision in *Autoclenz Limited v Belcher* provides much clarity to the question of self employed contractors.



The case is about whether a person, who is expressly described as a self-employed contractor in his contract, is really a “worker” (and thus entitled to certain rights, including minimum wage and paid holiday) as a result of the true nature of the relationship between the parties. (In this case, the Supreme Court also decided that they were “employees”, but claims for minimum wage and holiday only required that they prove they were “workers”).

Some car valeters signed contracts describing themselves as self-employed subcontractors. They paid their own tax and had to purchase their own insurance, uniforms and materials (the latter two of which they could do from the “employer”). Their contracts stated they were under no obligation to attend work, although the tribunal decided – in practice - they were expected to attend work and provide services personally. The tribunal also found that they went into the contracts with their eyes open about being self-employed.

Which took precedence; the written contract, or the reality?

The Supreme Court decided that the *real* situation defeats what was written in the contract. It was not necessary for the valeters to prove a “sham”, in the sense that the parties intended to mislead HMRC. The fact that the employer had written a “substitution clause” into the contracts did not reflect the reality, as everyone expected the valeters to carry out their duties personally.

The question to be decided is “what is the true agreement between the parties?” That *may well* be what is written down, but is not necessarily so.

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Vicarious Liability

Brink's Global Services Inc v Igrox Limited [2011] is an interesting development on the stance of vicarious liability. Traditionally an employer can be held to be liable for the consequences of their employee's actions if the conduct in question was during the course of their employment, and not whilst the employee was "on a frolic of their own."



In this latest case the wrongful act was theft that did not happen during the course of employment or upon the employer's instructions. However the employer was found to be vicariously liable due to there being a sufficiently close connection between the wrongful act and the employment - the risk of theft was found to be reasonably incidental to the purpose for which the employee was employed.

Employers should therefore assess the risk of liability to third parties to which their employees could expose them and provide appropriate instruction and supervision to the employees, as well as ensuring there is adequate insurance in place.



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IMPORTANT NOTICE

These notes are for guidance purposes only. We believe the contents to be correct, but they should not be taken as accurate or complete or to apply to specific situations, without first referring to us.

Please feel free to call the office and speak to one of our employment team who will be willing to assist with any queries you may have.

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