



PENINSULA

Business Services
Ireland

Agency Workers FAQ

The Government has introduced legislation to give effect to the EU Directive on Temporary Agency Work which applies with effect from 5 December 2011. The Directive aims to protect Temporary Agency Workers and in so doing applies the principle of equal treatment to their basic working and employment conditions e.g. pay, annual leave etc. in the same way as if those workers were directly recruited by the Hirer to do the same job. A Bill to give effect to the Directive was published in December 2011, and following a series of Seanad debates it was submitted to President Higgins, and the Protection of Employees (Temporary Agency Work) Act, 2012 was ratified on 16th May 2012.

Peninsula Business Services has put together a list of some of the most frequently asked questions regarding this topic to help shed light on an area of legislation that is one of the more tricky elements of Irish Employment Law.

1. Who does the Directive apply to?

It applies to Temporary Agency Workers who are employed by an Employment Agency under a contract of employment and are assigned to work temporarily for, and under the direction and supervision of, a Hirer or End User.

The bill also gives the scope for which the legislation does not apply, which is:

- (a) Self-employed persons i.e. persons who are in business on their own account and who are placed by an Employment Agency.
- (b) Managed Service contracts i.e. persons who work under the supervision and direction of the Agency which employs them - not under the supervision and direction of the company where they work.
- (c) In respect of **pay** only, the Directive does not apply to an Agency worker who has a permanent contract of employment with the Agency and is paid between assignments. All other elements of equal treatment outlined in the Directive will apply in that circumstance.

2. What is Equal Treatment?

Equal treatment relates to pay and basic working conditions for Agency Workers which would be received if they were directly recruited to the same job by the Hirer/End User.

Equal treatment in this context extends to the following range of issues:

- a) Pay, which is defined as;
 - Basic pay
 - Shift premium
 - Piece rates
 - Overtime premium
 - Unsocial hours premium
 - Sunday premium where a Sunday is worked and a premium is normally paid to a directly recruited employee

- b) Working time
- c) Rest periods
- d) Rest breaks
- e) Night work
- f) Annual leave
- g) Public holidays
- h) Access to collective facilities and amenities (e.g. canteen, childcare and transport facilities)
- i) Access to information on vacancies in the Hirer Company.

An Agency worker is entitled to equal treatment on each of these conditions of employment for the duration of his or her assignment. The Bill also provides clarity as to what is excluded from the definition of pay. This is essentially everything that is not included above, as the above is an exhaustive list. For example, the following elements of a possible remuneration packages are excluded from the definition of pay in the Bill:

- (a) Occupational pension schemes
- (b) Financial participation schemes
- (c) Sick pay schemes
- (d) Benefit in kind
- (e) Bonuses
- (f) Maternity/Adoptive Leave

3. What entitlement will Agency Workers have to access collective facilities?

Temporary Agency Workers should be provided with access under the same terms as directly recruited workers to collective facilities and amenities of the Hirer/End User. Typically, this could extend to access to any or all of the following:

- (a) Canteen or other similar facilities;
- (b) Child care facilities;
- (c) Access to transport services.

This is the only element of the Directive where there can be “objective justification” for less favourable treatment of Temporary Agency Workers. In other words there must be a good reason for treating the Agency worker less favourably and a Hirer/End User should be able to provide strong evidence to support that reason.

4. Is there a "lead-in" or qualifying period before equal treatment applies?

For anyone who has been closely following the discussions on the directive, they will be aware that the major question posed was that of whether or not a ‘derogation’ would apply. This is a period of time where an Agency worker can work for the Hiring Company/End User without the need to be given Equal Treatment as defined above.

No such agreement was reached and as a result equal treatment applies to Agency Workers from "day one" of the assignment. Other countries have derogations in place (the UK have a qualifying period of 12 weeks before an Agency Worker will receive equal treatment) but in Ireland's case, it could only have been agreed under the terms of the Directive by Social Partners and this did not happen.

It is important to note that if a Temporary Work Agency is based in Northern Ireland and Hiring out to Northern Ireland the derogation of 12 weeks applies, however if hiring out to the Republic of Ireland the Laws of the Republic of Ireland apply.

No agreement could be reached on the length of the Qualifying Period. Interestingly all parties agreed that a Qualifying Period was necessary, but as mentioned no agreement was

reached on the length of this period and as a result talks on the subject broke down as the parties were too far apart.

5. Does the Directive apply to new and existing Agency Workers?

There is a retrospective element to the Directive in relation to Pay, whereby from the 5th December 2011, existing Agency Workers who are working for an End User regardless of the date of assignment are entitled to equal treatment in regards to pay from 5th December, 2011. New assignments on or after the 5th December, 2011, are entitled to equal treatment in regards to Pay from the date of their assignment.

In the event that an Agency Worker is entitled to an increase in pay or annual leave arising from the Directive that takes effect from 5th December 2011, the entitlement to the increased level of payment will apply from 5th December 2011 onwards. It is important to note that the application of retrospection applies to pay only does not apply to other basic working and employment conditions

6. Are other benefits retrospective?

The retrospective element applies only in relation to Pay. It was felt that it would be too unwieldy to award entitlement in relation to annual leave, rest breaks and access to collective facilities. The question was posed how can you retrospectively apply a benefit such as access to a Crèche or Canteen to an employee? In view of this it was deemed that the only retrospective entitlement would be to do with Pay, as this can be easily calculated and back paid to employees.

7. Who is responsible for ensuring equal treatment?

As employer, the Employment Agency has primary responsibility for ensuring that equal treatment applies for the Agency worker. However, this is dependent on the Agency being provided with sufficient up-to-date information by the Hirer/End User. In practice, the Agency will have to show that it obtained or took reasonable steps to obtain relevant information from the Hirer/End User about its basic working and employment conditions and treated the Agency worker accordingly. There is a statutory indemnity in the legislation protecting the Agency where violation of the Act is accredited to the failure of the Hirer/End User to provide the information. If there is an argument to show the Hirer/End User provided fraudulent information to the Agency it will mitigate against the Agency being solely liable in the event of a claim by the Agency Worker.

8. Can the provision for Equal Treatment be avoided?

The matter of equal treatment can be avoided if the Temporary Work Agency utilise what is called the "*Swedish Derogation Model*".

9. What is the Swedish Derogation Model?

This is an exemption in the Act whereby the Temporary Work Agency elects to engage the Agency Worker on a full time contract of employment and pay the Agency Worker a wage in between assignments. By doing so, the Agency Worker will receive a basic wage consistently and when on assignment they do not have to be paid the full rate of a comparable employee. Instead they would receive 50% of the Comparable Employee rate or the National Minimum Wage, whichever is more.

This model would be particularly beneficial to End Users as it is a way of engaging Agency Workers on rates lower than Comparable Employees.

10. What does the Directive mean for a Temporary Work Agency?

An Agency supplying Temporary Agency Workers to a Hirer/End User will need to ensure that the correct pay and basic working conditions are applied to an Agency Worker to

ensure that they are treated as if they had been directly recruited to the same job. As is currently the case, the Agency remains the employer of an Agency worker and so the liability rests with the Agency.

As a result of the new draft legislation Employment Agencies will need to;

- Review their contract documentation with their clients and potentially look at drafting guarantees for that contractual documentation.
- Include an obligation on the End User to provide information about pay and basic working conditions to them so they can ensure the temporary workers are being paid in accordance with the draft legislation as and from the 5th December 2011.
- Seek information from their Client Companies/End Users in writing in relation to what the client would be paying the Agency Worker had they been recruited directly. This is vitally important and should be documented and retained on file. If the information is not provided, the Agency should take all reasonable steps to follow up and obtain the information from the Client. Such documentation may be necessary to limit an Employment Agency's liability under the proposed legislation.
- look at information they will be required to furnish to the Client Companies/End Users about how individual Agency Workers are retained by them as End Users will need this information in order that they can determine who exactly in their organisation is covered by the provisions of the legislation once it is enacted.

11. What does the Directive mean for a Hirer/End User?

A Hirer who hires Agency Workers through an Agency should provide the Agency with sufficient up-to-date information on basic pay and employment conditions so that the Agency, as employer, can satisfy itself that an Agency Worker is getting equal treatment, as if they had been recruited directly to the same job. The Hirer/End User will be responsible for ensuring that all Temporary Agency Workers can access collective facilities and amenities and access information on job vacancies.

As a result of the proposed Legislation Hirers/End Users should;

- Review their contractual documentation with the Agency and seek guarantees from the Agency in respect of how Agency Workers are retained by the Agency as this information will enable the client to determine who in their organisation is caught by the legislation once enacted.
- Undertake a workforce audit in order that they can establish who exactly is covered by the legislation. They will then need to give consideration to what those Agency Workers would be paid had they been recruited directly as and from the 5th December 2011. This information will also need to be furnished to the Agency.
- Give consideration to who has responsibility for liaising with the Agencies to ensure the organisation is legally protected in so far as practicable.
- Obtain assistance from their legal advisors in drafting the appropriate guarantees that can now be inserted into contractual documentation.

12. What If Either Temporary Work Agency Or The End User Refuse To Comply With Their Obligations?

For the most part under the legislation the Temporary Work Agency are held to be the employers in respect of contravention of the Act. There are statutory indemnities in place to protect the Agency if they can attribute the contravention to the End User providing incorrect or fraudulent information.

If your business employs Agency Workers or you use Agency Workers and you are unsure of your potential liability please contact the Peninsula Business Services Advice Line on 1890 252 923 and speak to one of our advisors, or contact us on www.peninsula-ie.com