

AGENCY WORKERS REGULATIONS Guidance

1. New Agency Workers Regulations (AWR) came into effect on 1 October 2011 in Great Britain – Agency Workers Regulations 2010 (SI 2010/93) and Agency Workers Regulations (Amendment) Regulations 2011 (SI 2011/1941). For Northern Ireland the Agency Workers Regulations (Northern Ireland) 2011 (SI 2011/350) came into effect on 5 December 2011, with the same interpretation, meaning, qualifying period and rights for qualifying workers. This Optical Confederation Guidance relates to both sets of regulations.
2. These regulations give effect in UK law to the European Agency Workers Directive 2008/104/EC.

What the new regulations do

3. The regulations give
 - new **Day 1 rights** to all temporary agency workers from the day they start
 - new **equal treatment rights** to temporary agency workers, who have been with a business and doing broadly the same job, for **more than 12 weeks**.

What is an agency worker?

4. An agency worker is any temporary worker who has been hired through an agency and who meets the following criteria
 - there is a contract between the worker and a temporary worker agency (TWA)
 - that worker is temporarily supplied to a hirer by a TWA
 - when working on the assignment, the worker is subject to the supervision and direction of that hirer.

When the Regulations do not apply

5. The Agency Workers Regulations do not apply
 - if the person hired operates as an independent business in their own right (eg a limited company) even if they are a business of one. In these cases the arrangement is a simple business-to-business/provider-to-customer relationship, rather than one between worker and hirer.
 - if the agency operates as a client of the person hired, and is only paid an introductory fee, and the person hired is paid directly by the business. This has historically been the case in optics.

6. Members should be aware that guidance issued by the Department for Business, Innovation and Skills (BIS) (see paragraph 26 below) states that simply putting earnings through a limited company would not in itself put individuals beyond the scope of the Agency Workers Regulations.
7. The Agency Workers Regulations do not cover employment agencies who introduce workers to employers for permanent or direct employment. Once a worker is placed with an employer, they have no further contractual relationship with the agency.
8. In-house 'staffing banks' are not included where a company employs its own workers directly. However, if these workers are supplied to third parties, then the in-house bank would be acting as a temporary worker agency for the purposes of these regulations.

When do the regulations start?

9. The new regulations came into effect on **1 October 2011** for **Great Britain** and are not retrospective ie the clock for the 12 week qualifying period only starts on 1 October 2011 and cannot be backdated. For **Northern Ireland** they came into effect on **5 December 2011**.

Day 1 Rights for Agency Workers

10. Day 1 Rights means that - from the day they start and in exactly the same way as comparable employed staff - agency workers must be given
 - access to facilities eg staff canteen, staff transport facilities, car parking and child care facilities
 - notification about any job vacancies within the hiring organisation
 - permission to take (unpaid) time off for antenatal appointments.

12 weeks Equal Treatment Rights

11. In addition, after a 12 week qualifying period, agency workers must be permitted to enjoy pay and general working conditions in the same way as comparable employed staff including
 - pay related to work done (including performance bonuses)
 - rest periods
 - rest breaks
 - overtime
 - night work
 - (paid) time off for antenatal appointments
 - annual leave.

12 week Qualifying Period

12. The 12 week qualifying period is triggered by an agency worker doing substantively the same job with the same hirer for 12 calendar weeks.
13. A calendar week is calculated as any period of 7 days starting with the first day of the assignment regardless of how many hours a day or week the worker actually works. (For example a person working only a couple of hours a week will still be entitled to the same equal treatment rights after 12 calendar weeks as, for example, a full-timer working in this way.)
14. The 12 week qualifying period is not triggered if there has been a full 6 week break between assignments.
15. If there has not been a full 6 week break between assignments, the meter keeps running and the agency worker is entitled to the equal treatment rights immediately the 12 week qualifying period clocks up.
16. The 12 week clock is also only “paused” (rather than the qualifying period being broken and the clock reset) in cases of sick absences (up to 28 weeks), annual leave, business shut-downs (eg school holidays), jury service (up to 28 weeks), industrial action or for any other reason where the break is less than 6 weeks.
17. In addition the clock is not “paused” but continues to accrue in cases of pregnancy or maternity-related absence or statutory maternity, paternity or adoption leave.

Simultaneous Qualifying Periods

18. An agency worker working for more than one hirer during a week (or even during a day) will have separate qualifying periods running with each hirer at the same time.
19. Equally if an agency worker is placed for a period via one agency and then is placed with the same hirer doing effectively the same job by another agency, both periods qualify towards the 12 week period qualifying period for that agency worker with that business.

Reasons for the qualifying clock to be reset to zero

20. Most commonly, this will be
 - when an agency worker begins a new assignment with a new hirer
 - where an agency worker remains with the same hirer but is moved to a substantively different job role (this can re-set the qualifying period clock immediately without a break)
 - if there is a break of 6 weeks or more between assignments with the same hirer.

Anti-Avoidance

21. In the case of a dispute the courts have established a number of tests which examine the individual worker’s circumstance and all aspects of the relationship including the

contract, the expectations of the parties and how they actually behaved during the assignment.

22. A tribunal or a court is likely to take a dim view of an agency worker, hirer or both deliberately “gaming” the system eg manufacturing transfers between roles or assignments to avoid the regulations.
23. A change of manager, new pay rate, new office etc do not count as a substantively different job (ie a new assignment) under these regulations.
24. A genuinely new assignment has to be substantively different eg a combination of
 - different skills and competences being used
 - extra training (or a previously un-required qualification) needed
 - the pay rate is different
 - location/cost centre is different
 - working hours are different
 - the line manager is a different manager.

Action

25. Optical hirers are advised to
 - assess whether they have any agency workers under hire (who are paid via the agency ie not directly by the business/contractor)
 - put in place Day 1 rights for those staff from 1 October 2011 for Great Britain and 5 December 2011 for Northern Ireland
 - start the 12 weeks qualifying period clock from 1 October 2011 in respect of those staff
 - put in place procedures for Day 1 rights and 12 week qualifying period monitoring for all agency workers hired after 1 October 2011 for Great Britain and 5 December 2011 for Northern Ireland.
 - check whether these regulations might affect the assessed employment status of any self-employed practitioners or locum staff. Please contact your Optical Confederation representative body if you need assistance with this (see below).

Further information

26. This guidance is guidance only and not a full statement of the law. For this, members are referred to the excellent guidance produced by the Department for Business, Innovation & Skills (BIS) which includes a helpful series of worked examples. The BIS

guidance is available here <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance.pdf>.

27. For guidance in particular cases, members should seek their own legal advice or consult their representative body within the Optical Confederation

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