

people:skills:jobs:



Department for  
**Employment  
and Learning**  
[www.delni.gov.uk](http://www.delni.gov.uk)

# Guidance on the Agency Workers Regulations (Northern Ireland) 2011



October 2011

## Index

<b>1. Introduction</b>	<b>3</b>
(a) Quick start guide	3
<b>2. Scope</b>	<b>6</b>
(a) In scope	7
(i) Temporary Work Agency	7
(ii) Agency Worker	8
(iii) Hirer	8
(b) Out of scope	9
<b>3. Qualifying for ‘equal treatment’</b>	<b>14</b>
(a) Rights under these Regulations	14
(b) Day 1 rights for all Agency Workers	14
(i) Access to collective facilities and amenities	14
(ii) Access to information on job vacancies	16
(iii) Day 1 rights - liability and summary	17
(c) After 12 weeks in the same job	17
(i) Calculating the 12-week Qualifying Period	18
(ii) Working for multiple Hirers	20
(iii) The Qualifying Clock	20
(iv) Definition of ‘new’ Hirer	23
(v) Substantively different	23
<b>4. How to identify ‘basic working and employment conditions’ and the relevance of a ‘comparator’</b>	<b>26</b>
(a) How equal treatment is established	26
(b) Comparator	26
<b>5. Pay</b>	<b>29</b>
(a) What ‘pay’ includes	29
(b) What ‘pay’ excludes	29
(c) Bonuses linked to individual performance	30
(d) Performance appraisal systems	31
(e) Annual pay award	33
<b>6. Working time and holiday entitlements</b>	<b>35</b>
(a) Working Time entitlements (working time, night work, rest periods, breaks)	35
(b) Paid holiday leave	35
(c) Payment in lieu option	36
<b>7. Pregnant workers and new mothers</b>	<b>37</b>
(a) Responsibility of the pregnant Agency Worker	38
(b) Responsibility of the Agency	39
(c) Responsibility of the Hirer	39
(d) Suitable alternative work	39
(e) Ante-natal appointments	39
<b>8. Pay between assignments a.k.a. ‘Swedish Derogation’</b>	<b>41</b>
(a) New entitlements	41
(b) Permanent contract of employment	41
(c) Rate of pay between assignments	43
(d) Ending a pay between assignments contract	44
(e) Pregnant workers working on a pay between assignments contract	44
<b>9. Information requests, liability and remedies</b>	<b>46</b>
(a) Information an Agency must have before supplying an Agency Worker	46
(b) Compliance information required by an Agency from a Hirer	47
(c) Working through multiple Agencies	48
(d) Process for an Agency Worker to obtain information	48
(e) Alternative Dispute Resolution	51
(f) Liability and remedies	52
<b>10. Other factors</b>	<b>55</b>
(a) Thresholds for bodies representing Agency Workers	55
(b) Informing workers’ representatives	56
<b>11. Feedback</b>	<b>58</b>
<b>Appendix A – Agency to Hirer Letter</b>	<b>59</b>
<b>Appendix B – Agency Worker list of previous assignments</b>	<b>61</b>

# 1. Introduction

## *At a glance*

1.1 The Agency Workers Regulations (Northern Ireland) 2011

## *Aim of the guidance*

1.2 The aim of this guidance is to help Agency Workers, Hirers of Agency Workers, and the recruitment sector to understand The Agency Workers Regulations (Northern Ireland) 2011, and the implications and responsibilities for all involved.

1.3 Each section covers the key provisions of the Regulations and, where possible, is accompanied by illustrative examples and useful links.

1.4 This guidance applies only to Northern Ireland. Great Britain has its own separate Regulations and Guidance.

## *When the law changes*

1.5 The legislation will come into operation on 5 December 2011, giving Agency Workers the right to the same basic employment and working conditions as if they had been recruited directly, if/when they complete a qualifying period of 12 weeks in the same job. It is not retrospective and, for those Agency Workers who are already on assignment, the 12-week qualifying period shall only begin to be counted from 5 December 2011.

1.6 The legislation also provides flexibility to permit arrangements for Agency Workers on permanent contracts of employment who are paid between assignments.

1.7 From 5 December 2011, Agency Workers will also be entitled to access to collective facilities and information on job vacancies, from Day 1 of their assignment.

## **(a) Quick Start Guide**

### *New rights for Agency Workers from 5 December 2011*

1.8 The information below outlines the key changes and new responsibilities.

### *New rights*

1.9 **Day 1 rights for all Agency Workers:** If you hire Agency Workers, you must ensure that they can access your **collective facilities** (such as canteen, childcare facilities etc.) and can access **information on your job vacancies** from the first day of their assignment.

- 1.10 **After 12 weeks in the same job:** The equal treatment rights relate to **pay** and **other basic working conditions** (annual leave, rest breaks etc.), and come into effect after the Agency Worker has completed a **12-week qualifying period** in the same job with the same Hirer. After completing the qualifying period, pregnant Agency Workers will be allowed to take paid time off for ante-natal appointments during an assignment.
- 1.11 These rights are **not** retrospective and for those Agency Workers on assignment, the 12-week qualifying period shall only begin to be counted from **5 December 2011**.
- 1.12 **Permanent contracts of employment and payment between assignments (the Swedish Derogation):** This provision allows an Agency to offer an Agency Worker a permanent contract of employment, and pay the Agency Worker between assignments (i.e. when they are not working). This means that after 12 weeks in a given job, the Agency Worker will not be entitled to the same pay as if they had been recruited directly. However, they will be entitled to receive a guaranteed minimum level of pay during any period when they are not working. The Swedish Derogation also provides an Agency Worker with a permanent contract of employment. It does not, however, change an Agency Worker's employment status.
- 1.13 All Agency Workers, including those covered by the Swedish Derogation are entitled to other new provisions under the Regulations. In particular, equal treatment in relation to the duration of working time, night work, rest periods and rest breaks and annual leave after 12 weeks. Agency workers covered by the Swedish Derogation are also entitled to the Day 1 entitlements.

### ***What this means for you***

- 1.14 **If you are a Hirer of Agency Workers:** If you are an employer and hire temporary Agency Workers through a temporary work agency, you should provide your Agency with up-to-date information on your Terms and Conditions, so that they can ensure that an Agency Worker receives the correct equal treatment, as if they had been recruited directly, after 12 weeks in the same job. You are responsible for ensuring that all Agency Workers can access your collective facilities and are able to view information on your job vacancies from the first day of their assignment with you.
- 1.15 **If you are an Agency Worker:** From 5 December 2011, after you have worked in the same job for 12 weeks, you will qualify for equal treatment in respect of pay and basic working conditions. The equal treatment provision in respect of pay will not apply, however, if you are on a permanent contract of employment with pay between assignments.

- 1.16 You can accumulate the number of weeks which count towards equal treatment, even if you only work a few hours a week. Your temporary work agency is likely to ask for details of your work history, to help establish when you are entitled to equal treatment (separate guidance is available for Agency Workers on: [www.nidirect.gov.uk/employment](http://www.nidirect.gov.uk/employment)). These additional enhancements do not, however, change your employment status. Unless already so entitled, you will not be entitled to any new rights to maternity/paternity leave or redundancy pay.
- 1.17 **If you are a temporary work agency:** If you are involved in the supply of temporary Agency Workers, you should ask the Hirer for information about **pay** and **basic working conditions** (when it is clear that the Agency Worker will be in the same job with the same Hirer for more than 12 weeks). This is to ensure that the Agency Worker is treated as if they had been directly recruited to the job.

## **2. Scope (regulations 2-4)**

### ***At a glance***

2.1 The Agency Workers Regulations (Northern Ireland) 2011 apply to:

- individuals who work as temporary Agency Workers;
- individuals or companies (private, public and third sector e.g. charities, and social enterprises) involved in the supply of temporary Agency Workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a Hirer; and
- Hirers (private, public, and third sector).

2.2 This section addresses who is covered by the Regulations, and who is likely to be outside the Regulations, together with illustrative examples.

### ***Covered in this section***

2.3 The definition of who is covered by the Regulations:

- Temporary Work Agency ('Agency')
- Agency Worker
- Hirer

2.4 Those who are likely to be outside the scope of the Regulations include individuals:

- who find work through an Agency, but are in business on their own account (where they have a business-to-business relationship with the Hirer, who is a client or customer);
- working on Managed Service Contracts, where the worker does not work under the primary direction and supervision of the host organisation;
- working for in-house temporary staffing banks, where a company employs its temporary workers directly (and they only work for that same business or service);
- who find direct or permanent employment with an employer through an employment agency; and
- on secondment or loan from one organisation to another (this is usually where the main activity of the organisation seconding the individual is not the supply of individuals to work temporarily under the direction and supervision of another party).

2.5 In the event of disputes, it is preferable for these to be resolved in the workplace at the earliest opportunity, thereby minimising the negative impact on working relationships, as well as the costs, stress, and time involved for all parties. If there is a dispute about whether someone is

within the scope of the Regulations, the Labour Relations Agency is available to provide advice and assist in pre-claim conciliation processes (see Alternative Dispute Resolution).

- 2.6 If such intervention is unsuccessful, and a claim is subsequently brought before a Tribunal, then an Industrial Tribunal will consider if the description of the arrangements reflects the reality of the relationship.

## **(a) In scope**

### **(i) Temporary Work Agency ('Agency')**

2.7 An Agency supplies Agency Workers to work temporarily for a third party (the Hirer). The Agency Worker works temporarily under the supervision and direction of the Hirer, but only has a contract (an employment contract or a contract to perform work or services personally) with the Agency. Under the Regulations, an Agency is a person (individual or company) in business, whether operating for profit or not, and including both public and private sector bodies involved in the supply of temporary Agency Workers. This could be a 'high street' agency but also an **intermediary**<sup>1</sup> such as an **umbrella company** or a **master vendor** or **neutral vendor**, if they are involved in the supply of the Agency Worker.

2.8 An individual is not prevented from being an Agency Worker under the Regulations simply because they work through an intermediary body. For example, an individual working through an umbrella company, who finds work via an Agency, is covered by the Regulations. The individual will usually have an overarching employment contract with the umbrella company with full employment rights and all of the employee's income being treated as employment income. However, that will not prevent the individual from benefitting from these Regulations.

### ***Involvement of others in the supply of Agency Workers***

2.9 Sometimes the supply of Agency Workers is managed on behalf of a Hirer by a master vendor or neutral vendor that may, or may not, engage and supply workers directly or indirectly. These arrangements exist where a Hirer appoints one agency (the master vendor) to manage its recruitment process, using other recruitment agencies as necessary ('second tier' suppliers), or appoints a management company (neutral vendor) which normally does not supply any workers directly, but manages the overall recruitment process and supplies temporary Agency Workers through others.

---

<sup>1</sup> This is not a legal term defined under the Regulations but reflects current formations such as umbrella companies, master vendors, neutral vendors, tax efficiency businesses and CIS intermediaries.

2.10 Master vendors or neutral vendors fall within the legal definition of an Agency, in light of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals.

2.11 **It is important that the correct information from the Hirer is shared between parties in the chain of supply of the individual Agency Worker. This is to ensure that whoever actually pays the Agency Worker is aware of his/her exercisable right, as provided by the Regulations, to the basic terms and conditions that they would have received if they had been directly recruited. See section on information requests for more detail.**

## **(ii) Agency Worker**

2.12 An Agency Worker (sometimes referred to as a ‘temp’) is someone who has a contract with the Agency (an employment contract or a contract to perform work or services personally), but works temporarily **for and under the direction and supervision of a Hirer**. The unique, tripartite relationship between Agency Worker, Agency, and Hirer is a key feature of these Regulations and informs who is covered by them.

2.13 The key elements required for someone to be an Agency Worker are:

- there is a contract (an employment contract, or any other contract to perform work or services personally) between the worker and an Agency;
- that the Agency Worker is temporarily supplied to a Hirer by the Agency;
- when working on assignment, the worker is subject to the supervision and direction of that Hirer; and
- the individual in question is not in a business on their own account (where they have a business-to-business relationship with the Hirer who is a client or customer).

## **(iii) Hirer**

2.14 The Hirer (end user) is a ‘person’ (i.e. company, partnership, sole trader, public body) who is engaged in economic activity (whether or not for profit), and which engages Agency Workers through an Agency. The Hirer is responsible for supervising and directing the Agency Worker while they undertake the assignment. A Hirer will have its own legal identity; therefore a division within a company will not be a separate Hirer if it does not have its own legal identity.



### ***Illustrative examples***

#### **Example characteristics of an Agency Worker**

- ✓ The Agency Worker works for a variety of Hirers on different assignments, but is paid by the Agency who deducts Income Tax and National Insurance contributions.
- ✓ The Agency Worker has a contract with the Agency, but works under the direction and supervision of the Hirer.
- ✓ Time sheets are given to the Agency who pays the Agency Worker for the hours worked.
- ✓ If an Agency Worker is on sick leave, the Agency pays the Statutory Sick Pay (subject to satisfying the criteria applicable to all workers).
- ✓ The Agency pays holiday pay when paid statutory annual leave is taken.

#### **Example characteristics of a worker who is outside the Regulations**

- ✗ The 'employment agency' introduces an individual to an employer for a directly employed role, paid by the employer.
- ✗ The contract is agreed between the worker and the employer, and is open-ended or may be for a fixed period.
- ✗ There is no ongoing contractual relationship between the 'employment agency' and the worker.

### **(b) Out of scope**

2.15 The definition of an Agency Worker excludes those who are in business on their own account, where the status of the Hirer is that of a client or customer of a "profession or business undertaking" (i.e. a genuine business-to-business relationship).

#### ***When is an individual in a profession in or out of scope?***

2.16 The definition of an Agency Worker excludes those who are in a "profession or business undertaking carried out by the individual", where the Hirer is a client/customer of the individual (i.e. a genuine business-to-business relationship). A professional is normally someone who is certified by a professional body, such as a doctor or lawyer. Normally a professional, or a person in business providing services to a client or customer, is not working under that person's supervision and direction. However, it is still possible for someone in a profession or in

a business to be an Agency Worker, if there is no such client or customer relationship.

**2.17 Simply putting earnings through a Limited Company would not in itself put individuals beyond the possible scope of the Regulations.**

2.18 Individuals may choose to do this for the sake of flexibility or for tax reasons. However, where the relationship between the individual, Agency, and Hirer remains essentially a tripartite relationship, and a Hirer is not a client or customer of such individuals, they are likely to be in scope of the Regulations.

2.19 In the event of a dispute, in order to establish if a worker is genuinely in business on their own account (business-to-business relationship), the Courts and Tribunals have devised a number of tests to establish the reality of the relationship. These tests examine the individual's circumstances and consider all aspects of the relationship, including: what a contract might say or what it does not say; the expectations of the parties; and their conduct.

2.20 If the arrangements do not reflect the reality of the relationship, or are an avoidance tactic, then individuals are likely to fall within scope of the Regulations. This may happen in the case where, despite the wording of a contract, the reality is that the individual is not in business on their own account and they work under the supervision and direction of the Hirer.

2.21 For further information about employment status, please refer to [Understanding your employment status \(NIDirect\)](#).

2.22 It is preferable for disputes to be resolved in the workplace at the earliest opportunity, thereby minimising the negative impact on working relationships, and the Labour Relations Agency is available to assist in providing advice and Alternative Dispute Resolution support (see Alternative Dispute Resolution).

2.23 Ultimately, in the event of a dispute, it will be for an Industrial Tribunal to decide the reality of the relationships between the parties involved and they may, for instance, look at whether the types of arrangements in place are common to the types of work involved.

***Placing a Worker in direct or permanent employment***

2.24 The Regulations do not cover employment agencies who introduce workers to employers for direct or permanent employment. Once a worker is placed with an employer, they have no further contractual relationship with the agency.

2.25 Some agencies offer both temporary and permanent vacancies. A work-seeker's relationship with the agency depends on what type of work they want to do. These Regulations only apply when supplying temporary Agency Workers to Hirers (i.e. where they are acting as Agencies). Agencies should ensure that they make clear the way in which they are acting on behalf of the individual worker, as required by the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005.

### ***Managed service contracts***

2.26 Where a company provides a specific service to a customer, such as catering or cleaning, this is usually known as a Managed Service Contract which is based on a contract for services that will usually set out certain service level agreements. The Managed Service Contractor has responsibility for managing and delivering the catering or cleaning service and employs, rather than supplies, the workers.

2.27 The Managed Service Contractor must be genuinely engaged in providing the primary supervision of, and direction to, its workers on-site on a day-to-day basis, and must determine how and when the work is done. If it is the customer that determines how the work is done, then it is more likely that the workers will be covered by the Regulations. Inevitably there may be some overlap between who provides the supervision/direction, but it is likely that responsibility for the primary supervision/direction will determine whether a Managed Service Contract is in place.

2.28 Merely having an on-site presence (i.e. a named supervisor) would not necessarily mean that there is a Managed Service Contract. Conversely, where the customer has some responsibilities for all workers on-site (i.e. health and safety responsibilities), this would not in itself mean that this was not a Managed Service Contract.

2.29 Please note that, where a Managed Service Contractor requests Agency Workers through an Agency to work under their supervision and direction, they will be in the scope of the Regulations, as the Managed Service Contractor will be the Hirer.

### ***In-house temporary staffing banks***

2.30 In-house temporary staffing banks are used as a source of internal flexibility. In practice, whether or not a particular arrangement falls within the scope of the Regulations will depend on the reality of the employment and organisational arrangements. They are unlikely to be within the scope of the Regulations where a company employs their temporary workers directly, and they are only supplied to work for that same business; in this scenario, they would not be acting as an Agency.

2.31 If the in-house bank supplies workers to third parties, including associated companies, the in-house bank would be acting as an Agency for the purposes of the Regulations.

***Illustrative examples***

**Characteristics that demonstrate an individual is in scope**

- ✓ A company has a staff canteen which is managed by an in-house catering manager. One of the company's catering staff is absent and is replaced by a worker supplied by an Agency. During this assignment, the worker is supervised and directed by the Hirer's catering manager. This worker fits the definition of an Agency Worker and is within scope of the Regulations.
- ✓ A number of factory workers are sent by an Agency to work on a Hirer's production line. As there are a lot of workers on the line provided by the same Agency, the Agency sends a manager who works on-site to deal with issues such as sickness absence or any other problems that may occur in relation to Agency Workers. However, each worker still does his/her job under the supervision and direction of the Hirer's factory manager. These workers all fit the definition of an Agency Worker and are within scope of the Regulations.
- ✓ Where one legal entity employs temporary workers and places them into another legal entity (i.e. an individual's contract is with one company, but they work for another), including other associated or group companies, then they are likely to be acting as an Agency. The workers all fit the definition of an Agency Worker and are in the scope of the Regulations.

**Characteristics that demonstrate an individual is out of scope**

- ✗ An organisation contracts out the management of its canteen. The contractor manages the entire operation of the canteen and is responsible for the direction and control of its own catering staff. Although they are working on the customer's premises, the contractor's workers are not Agency Workers because they are not subject to direction and control by the customer.
- ✗ An individual is working in Organisation A, but is on secondment to Organisation B who pays the individual until they return to the original Organisation A when the secondment ends. Organisation A is not acting as an Agency, as it does not fulfil all the requirements of an Agency given that its main activity is not the supply of workers.
- ✗ An individual works for an internal project team and is paid directly by his employer, covering a variety of temporary posts dependent on where he is needed. This will be outside the scope of the Regulations.

- ✘ Where a single legal entity recruits temporary staff directly, who work for the same legal entity, they will be outside the scope of the Regulations. The temporary staff are not Agency Workers, and the hiring company is not an Agency.
- ✘ An individual has set up his own limited company through which he provides IT services. He has a contract with an Agency and is supplied to work on a specific project with an anticipated duration of 12 months. The individual has no fixed working pattern and can determine how and when he performs his services. He can also send a substitute to perform the services at any time, or payment is made on the basis of a specific deliverable, or on a fixed price, and not simply on an hourly, daily or weekly rate. However, he is subject to the Hirer's reasonable and lawful instructions. Given the absence of personal service and mutuality of obligation, the company is a client/customer of the individual and, as such, the individual is outside the scope of the Regulations. This must be a true reflection of the reality of the relationships between the parties involved, and not simply a reflection of the contractual terms.

**Summary**

In Scope	Out of Scope
Agencies (including intermediaries) involved in supply of Agency Workers.	Genuinely in business on own account, and working for clients or customers.
Hirer (end user) supervising and directing the Agency Worker	In-house temporary staffing banks, secondments.
Agency Worker (in tripartite relationship including those working through umbrella companies or other intermediaries).	Managed Service Contract staff who work under the supervision and direction of the company which employs or engages them, and not under the supervision and direction of the company where they work.

### **3. Qualifying for ‘equal treatment’ (regulations 5-13)**

#### **(a) Rights under these Regulations**

##### ***At a glance***

- 3.1 This section covers the rights that Agency Workers will receive from the first day of an assignment. This section also covers rights in relation to basic working and employment conditions, following a 12-week qualifying period, and the timing of the receipt of these rights.
- 3.2 You should bear in mind that Agency Workers are already entitled to a range of statutory protections under the Working Time Regulations and National Minimum Wage etc. For further information on these statutory rights, please visit: [www.nidirect.gov.uk/employment](http://www.nidirect.gov.uk/employment)

#### **(b) Day 1 rights for all Agency Workers**

- 3.3 The Regulations give Agency Workers the same access to certain collective facilities provided by the Hirer, as well as to information on job vacancies. The basic test relates to what comparable workers and employees receive. From the **first day of their assignment**, the Agency Worker is entitled to:

- access to collective facilities; and
- access to information relating to vacancies.

##### **(i) Access to collective facilities and amenities**

- 3.4 **From Day 1 of an assignment**, Agency Workers are entitled to be treated no less favourably than a comparable worker or an employee<sup>2</sup>, in relation to access to collective facilities and amenities provided by the Hirer.
- 3.5 This is not intended to extend all benefits which a Hirer might provide to directly recruited workers or employees. Instead, it applies to collective facilities provided by the Hirer either to workers or employees as a whole, or to particular groups of workers or employees. These may include:
- a canteen or other similar facilities;
  - a workplace crèche;
  - transport services (e.g. in this context, local pick-ups and drop-offs, or transport between sites. It does not mean company car allowances, season ticket loans);

---

<sup>2</sup> An employee has a contract of employment; a worker is a wider category which includes someone who has a contract of employment or a contract where the individual undertakes to do or perform personally any work or services for someone who is not a client or a customer. [www.nidirect.gov.uk](http://www.nidirect.gov.uk)

- toilets/shower facilities;
  - staff common room;
  - waiting room;
  - mother and baby room;
  - prayer room;
  - food and drinks machines; and/or
  - car parking.
- 3.6 This is not an exhaustive list, and acts only as an indication of the kind of facilities which should be included. It applies to facilities provided by the Hirer and these facilities will usually be on-site. However, if, for example, a canteen is used on another site, or shared with another company, then this should also be available to Agency Workers.
- 3.7 This does not mean that Agency Workers will be given ‘enhanced’ access rights. For example, where access to a crèche involves joining a waiting list, the Agency Workers would also be able to join the list, but would not be given an automatic right to have a crèche place.
- 3.8 This right is not about access to off-site facilities, or benefits in kind, which are provided by the Hirer as part of benefit package to reward long-term service and loyalty. These might include subsidised access to an off-site gym, for example. However, this does not prevent Hirers offering such benefits to Agency Workers, should they so choose.

### ***Objective justification***

- 3.9 This is the only element of these Regulations where there can be ‘objective justification’ for less favourable treatment. Essentially, Hirers would have to ask themselves: “Is there a good reason for treating the Agency Worker less favourably?”, and be able to provide robust evidence to support that reason. It cannot simply be an unsubstantiated assertion.
- 3.10 Cost may be one factor to take into account, but Hirers are unlikely to be able to rely on cost alone to justify different treatment. Practical and organisational considerations could also be a factor, however this does not mean that unfair discrimination will be allowed to take place. Hirers will not be able to make arbitrary decisions which are not supported by evidence.
- 3.11 Even if there is objective justification, Hirers may wish to consider whether it is feasible to offer Agency Workers certain access to facilities on a partial basis, as an alternative to excluding them altogether.

### ***Access to facilities – comparable worker***

3.12 In relation to relevant collective facilities, an Agency Worker has the right to treatment that is no less favourable than that given to an actual comparable worker (i.e. an employee or worker directly employed by the Hirer).

3.13 Firstly, the Hirer should establish if there are any comparable employees or employees. To be comparable, they should be:

- doing the same or broadly similar work to the Agency Worker; and
- working at the same location as the Agency Worker. If there is no such person, then they should be in another location owned by the Hirer. This is to avoid any confusion when a company has several different buildings and may have, for example, a canteen in one particular location to which all direct employees in all the locations have access.

### **(ii) Access to information on job vacancies**

3.14 **From the first day of an assignment**, all Agency Workers are entitled to be provided with information about any relevant job vacancies within the Hirer that would be available to a comparable employee or worker.

3.15 Hirers can choose how to publicise vacancies, whether via the internet/intranet, or on a notice board in a communal area. Whatever the method of publicising this information, the Agency Worker should know where and how to access it. Similarly, where a Hirer has in place a method for communicating vacancies to permanent employees who are absent (on annual leave, for example), it would be good practice for the same method to be used for Agency Workers who are absent.

3.16 The above obligation does not, however, constrain Hirers' freedom regarding:

- any qualification or experience requirements, such as time in service with the organisation; or
- how they treat applications.

3.17 This right will not apply in the context of a genuine 'headcount freeze', which is put in place in order to prevent a redundancy situation. In this instance, posts may be ring-fenced for redeployment purposes or internal moves, which are a matter of restructuring and redeploying existing internal staff.

### ***Access to information on job vacancies – comparable worker***

3.18 The need to inform Agency Workers of vacancies is limited to where there is a comparable employee or worker currently based at the same



establishment. Practical difficulties would arise from including those comparators who may be geographically remote, or on the basis of comparison with a predecessor.

**(iii) Day 1 rights – liability and summary**

3.19 The Hirer is responsible for providing equal treatment for Day 1 entitlements, and is liable for any breach of this obligation. The Agency has no control over providing an Agency Worker with access to facilities when they are on an assignment.

3.20 Information about access to facilities is likely to be set out in company handbooks. The Hirer could either provide Agency Workers with information about their facilities (as part of an induction pack, for example), or provide information to Agencies to pass on to Agency Workers as part of the information about the assignment.

<b>Comparator for Day 1 rights</b>	<b>Access to Facilities</b>	<b>Access to Vacancies</b>
Employee or worker	Yes	Yes
Working for and under the supervision and direction of the Hirer	Yes	Yes
Engaged in the same or broadly similar work	Yes	Yes
Based at the same establishment	Yes	Yes
Based at a different establishment	Yes	No
Must still be employed/engaged at the time of the breach of the Regulations	Yes	Yes

**(c) After 12 weeks in the same job**

3.21 After an Agency Worker completes a 12-week qualifying period with the same Hirer in the same role, they will be entitled to have the same basic Terms and Conditions of employment, as if they had been employed directly by the Hirer.

3.22 These basic Terms and Conditions are:

- key elements of pay;
- duration of working time (e.g. if working is limited to a maximum of 48 hours per week);
- night work;
- rest periods;
- rest breaks; and
- annual leave.

- 3.23 In addition, pregnant agency workers who have completed the 12 week qualifying period will be entitled to paid time off for ante-natal appointments.
- 3.24 Any benefits gained by an Agency Worker after the completion of their 12-week qualifying period begin from the first day of Week 13. However, there may be specific internal qualifying periods set out by the Hirer which are also applicable to the Agency Worker (e.g. 12 months of service before consideration for annual leave increase). In this regard, the Agency Worker's relationship with the Hirer should still be considered to have begun on the first day of the relationship, and not the first day after the Agency Worker had completed the 12-week qualifying period. So, by the time the Agency Worker has completed their 12-week qualifying period, they have also built up three months' service in relation to internal qualifying periods. As such, an Agency Worker would be entitled to enhanced annual leave after twelve months, not twelve months and twelve weeks, if that is the period of service for comparable employees.

**(i) Calculating the 12-week Qualifying Period**

- 3.25 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 undertakes on a weekly basis.
- 3.26 Consequently, 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 undertaken up to and including the following Monday will count as one calendar week.
- 3.27 Agencies may find it useful to seek general information as to terms and conditions that would apply if an agency worker had been directly recruited by the hirer. This could be done at the same time as the Agency is obtaining the necessary information to allow them to place an agency worker in accordance with regulation 18 of the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005.
- 3.28 Alternatively, the Agency may wait until the temporary worker is being placed with the Hirer, at which time they will also be able to ask the Hirer for information in relation to any previous assignments that the agency worker has completed with the Hirer. If it appears that a qualifying period begun in an earlier assignment with the Hirer should continue in the new assignment, a discussion should take place between Agency and Hirer as to the nature of the previous role; if it was substantively different or broadly similar work. These discussions

and any decisions made as a result should be recorded and retained. See suggested **Appendix A** for this purpose. This suggested template is illustrative and indicative only. It is not mandatory to use it and agencies and hirers must comply with the regulations in a manner appropriate to the circumstances of each individual case.

### ***Accrual of the 12-week qualifying period***

3.29 The qualifying period is **not retrospective**. An Agency Worker will only start to accrue the 12-week qualifying period after the Regulations come into operation on 5 December 2011, even if the assignment began before 5 December 2011.

3.30 An Agency Worker can qualify for equal treatment after 12 weeks in the same role with the same Hirer, regardless of whether he/she has been supplied by more than one Agency over the course of that period of time. This means that even if the Agency Worker has just joined a particular Agency, he/she may already have completed the qualifying period in relation to a particular role with a particular Hirer, or at least have accrued a number of weeks towards completing it.

3.31 In order to ensure that the Agency Worker receives their correct rights, the Agency may wish to ask the Agency Worker for their up-to-date work history - the aim being to ensure that they have the correct information. Agencies would be advised to request this information from the outset and a suggested template for doing so is attached at **Appendix B** to this document. If they do not do so, then this could leave that Agency in a position where it may become liable, in whole or part, for any lack of equal treatment arising. Again, this suggested template is illustrative and indicative only. It is not mandatory to use it and agencies and hirers must comply with the regulations in a manner appropriate to the circumstances of each individual case.

### ***Information on previous assignments***

3.32 There is no legal obligation on the Agency Worker to provide information on previous assignments. However, if an Agency Worker fails to inform the agency when asked that they have worked for a Hirer before, and then brings a claim for equal treatment, the Industrial Tribunal may take this into account in assessing whether or not any award should be made. Agency workers may find it useful to retain their own record of assignments they have completed in order to advise each agency they sign with, and so as to assist them in the event of any dispute. The form at **Appendix B** could also be used for this purpose.

### ***Anti-avoidance provisions***

3.33 Hirers and Agencies should be aware of the anti-avoidance provisions under the Regulations. These provisions prevent a series of

assignments being deliberately structured, so as to prevent an Agency Worker from completing the qualifying period (see section on anti-avoidance measures, for more details).

## **(ii) Working for multiple Hirers**

3.34 An Agency Worker might work for more than one Hirer during a week (or even during a day), resulting in more than one qualifying period running at any one time.

### ***Illustrative examples***

#### **Working through multiple agencies**

An Agency Worker works for a Hirer for six weeks and is assigned during this period by Agency 1. Three weeks later, the same worker is placed with the same Hirer in the same job by Agency 2, for a further 8 weeks.

There has not been a break of more than six weeks between assignments. As such, the clock on the qualifying period pauses after the first six weeks with the Hirer, and restarts when the Agency Worker returns to the same job, three weeks later.

#### **Working for multiple Hirers**

An Agency Worker has an assignment to drive a HGV lorry for four days a week in total: one day a week, each for four different Hirers.

After twelve weeks, the Agency Worker will qualify for equal treatment in each of the four separate Hirers, subject to any breaks the Agency Worker takes during any of the assignments.

## **(iii) The Qualifying Clock**

3.35 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.

3.36 These provisions can best be explained by thinking of the qualifying period as a clock which runs from 0 -12. Sometimes a gap between assignments, or a move to a new assignment, will mean that the clock is re-set to 0 and must start again. In other circumstances, a break will have the effect of 'pausing' 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.

### 3.37 Reasons for the qualifying clock to be 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**. The circumstances in which an Agency Worker is regarded as no longer in the same role are considered below.
- If there is a **break between assignments with the same Hirer of more than of 6 weeks**.

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

- A break, for any reason, of **no more than 6 calendar weeks** and the Agency Worker then returns to the same Hirer in the same role.
- 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 of 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 (e.g. Christmas).
- A break caused by a **strike, lock out or other industrial action** at the Hirer's establishment.

### 3.39 Types of break where the qualifying clock continues to 'tick':

- Breaks due to **pregnancy, childbirth or maternity** which may take place during pregnancy and up to 26 weeks after childbirth.
- Any break due to the worker taking **maternity leave, adoption leave, paternity leave**, or any other form of statutory leave such as **parental leave or time off for dependents**.
- For any break due to a pregnant Agency Worker being offered suitable alternative work, the clock will continue to tick and the pregnant Agency Worker will continue to accrue weeks in relation to both the original Hirer and the new Hirer where she is working in another role.

3.40 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 the longer).

#### **Workplace closure**

Where an Agency Worker works in a factory and has an assignment which starts for 2 weeks before the factory closes during the summer period. The

assignment then continues when the factory reopens after the summer (or 2 separate assignments before and after the summer holidays). As the factory effectively closes, the qualifying 'clock' will pause and continue running from where it left off when it reopens. This will also be the case where a Hirer closes due to industrial action.

### **Different Types of Consecutive Absences**

An Agency Worker has a break of 5 weeks between assignments and then is absent for 2 weeks due to sickness. Sickness absence 'pauses' the clock which then resumes ticking when the worker returns to the same role.

In these circumstances, the break is longer than 6 weeks, but continuity is not broken as the clock is paused after 5 weeks.

### **Summary**

<b>Type of Absence that Affects the 12-week Qualifying Period</b>	<b>Effect on 12-week Qualifying Period</b>
An Agency Worker begins a new assignment with a new Hirer	Clock resets to zero
An Agency Worker remains with the same Hirer but is no longer in the same role (substantively different role)	Clock resets to zero
Break between assignments of more than 6 weeks	Clock resets to zero
Any reason where the break is less than 6 weeks	Pauses the clock
Sickness Absence	Pauses the clock for up to 28 weeks
Annual Leave	Pauses the clock
Shut downs (i.e. factory closure, school holidays)	Pauses the clock
Jury Service	Pauses the clock for up to 28 weeks
Industrial Action	Pauses the clock
Pregnancy and Maternity Related absence	Clock keeps ticking <sup>3</sup>
Statutory maternity, paternity or adoption leave	Clock keeps ticking <sup>4</sup>
Statutory parental leave or time off for dependents	Clock keeps ticking <sup>5</sup>
Any break due to a pregnant Agency Worker being offered suitable alternative work	Clock keeps ticking

<sup>3</sup> The protected period for a pregnant Agency Worker begins at the start of the pregnancy and ends 26 weeks after childbirth (or earlier if she returns to work).

<sup>4</sup> Where an Agency Worker has a contract of employment with an agency and is entitled to this type of leave.

<sup>5</sup> See footnote 4.

#### **(iv) Definition of ‘new’ Hirer**

3.41 The qualifying clock will be reset to zero if the Agency Worker stops working for one Hirer, and begins working for another.

3.42 Generally, such situations will be clear and self-evident. A new Hirer for this purpose must be a different person (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 to a substantively different role – see section on factors which indicate that a role is substantively different).

3.43 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. **Agencies should check this point with Hirers.**

3.44 Hirers and Agencies should be aware of anti-avoidance provisions, which prevent a series of assignments from being structured so as to prevent an Agency Worker from completing the qualifying period. These provisions would cover, for example, 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 prevent the Agency Worker from receiving equal treatment.

#### ***Illustrative examples***

A Health and Social Care Trust hires Agency Workers to work within its hospitals. Assuming the NHS Trust is a single legal entity, the qualifying period will continue to tick if the Agency Worker moves from one hospital to another within the Trust, where there are no breaks between assignments, or the break is no more than 6 weeks.

An Agency Worker is supplied to a number of Government Departments as a PA. The qualifying period will continue to tick if the Agency Worker moves from one Department to another to work as a PA, as it is the same legal entity, subject to any breaks between assignments which the Agency Worker takes.

#### **(v) Substantively different**

3.45 If there is a substantive change to a job role within the same Hirer, a new qualifying clock commences for the new role.

3.46 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.

Similarly, it is not enough 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 must be a genuine and real difference to the role.**

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

3.47 In the event of a dispute, a combination of factors can be expected to be taken into account by an Industrial Tribunal when establishing whether or not a role is 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?
- ✓ Does the role require extra training and/or a specific qualification that was not needed before?
- ✓ Is the pay rate different?
- ✓ Is the work in a different location or cost centre?
- ✓ Is the Line Manager different?
- ✓ Are the working hours different?
- ✓ Is different equipment involved?

***Illustrative Examples***

A warehouse has Agency Workers to work on a production line and to pack their products for distribution. Simply moving from the production line to a packing role requires little training, and uses the majority of the same skills, and is therefore unlikely to be substantively different. If they are working in the same role, then the Agency Workers will qualify for equal treatment after 12 weeks, subject to any breaks between assignments.

An Agency Worker has worked on a production line, but then moves to an administrative role. This is likely to be considered substantively different, and the qualifying period would start again.



3.48 In order for the 12-week qualifying clock to be reset to zero, the Hirer must notify the agency that the work and duties have changed, and this information must be passed to the Agency Worker:

- a Hirer must notify an Agency in writing when there is a new role that is substantively different (see the Conduct Regulations for more details), and record details of on-the-job requirements; and
- the Agency must provide a description of the new role in writing to the Agency Worker. The Agency should record details about the new vacancy and notify the Agency Worker, in writing, that their role has substantively changed and that the qualifying period will start again.

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

3.49 A Hirer can obviously decide not to engage Agency Workers beyond the 12-week qualifying period. However, Hirers and Agencies 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 rights.

3.50 For example, an Agency Worker completes two or more assignments with the same Hirer, where he/she has already worked for 12 weeks followed by a 6-week break, and then worked for a further 12 weeks followed by another 6-week break. If the Agency Worker is then taken on for a third assignment, this could be considered an attempt to avoid the completion of the qualifying period, but it would need to be clear that the attempt was deliberate. This would be a matter for an Industrial Tribunal in the event of a claim.

3.51 However, it is preferable for disputes to be resolved in the workplace at the earliest opportunity, thereby minimising the negative impact on working relationships, as well as the costs, stress, and time involved for all parties. If there is a dispute about whether someone is within the scope of the Regulations, the Labour Relations Agency is available to provide advice and assist in pre-claim conciliation processes (see Alternative Dispute Resolution).

## **4. How to identify ‘basic working and employment conditions’ and the relevance of a ‘comparator’ (regulation 5)**

### ***At a Glance***

4.1 This section covers how to identify what are the “basic working and employment conditions” to which an Agency Worker would be entitled, if they qualify under these Regulations, and how to receive them. It also examines when a ‘comparator’ is appropriate, and how one is identified.

### **(a) How equal treatment is established**

4.2 Deciding what equal treatment means will usually be a matter of common sense. The requirement is simply to treat the worker as if they had been recruited directly to the same job.

4.3 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. These conditions are ordinarily included in relevant contracts (or associated documents such as payscales, collective agreements) of direct recruits.

4.4 This means Terms and Conditions normally set out in:

- standard contracts/statements of written particulars;
- payscales or pay structures;
- relevant collective agreements; and/or
- company handbooks or similar.

4.5 It would not apply if there were genuinely no ‘basic working and employment conditions’ that apply generally.

4.6 In most cases, equal treatment can be simply established by giving the same relevant rights to a worker, ‘**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 be entitled to, given a particular role and his/her particular skills and qualifications).

### **(b) Comparator**

4.7 **It will not always be necessary to look for a comparator.** Given what is said above, it will often be quite possible to identify the appropriate “basic working and employment conditions” without one.

4.8 However, the Hirer will be deemed to have complied with the Regulations in respect of 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<sup>6</sup>.

- 4.9 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.
- 4.10 An examination of case law in relation to other employment legislation indicates that the question of whether two jobs are broadly similar can be answered by a general consideration of the type of work involved and the skill and knowledge required to do them. Different job titles, job descriptions or contractual obligations do not necessarily rule out a valid comparison. However, a more specific definition of what should be considered 'broadly similar' may arise as a result of case law occurring in due course in relation to these Regulations.
- 4.11 They must work in the same place 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.

### ***Illustrative examples***

#### **Where a Hirer has payscales or pay structures**

A Hirer has various payscales to cover the permanent workforce, including the 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 payscale. Is this equal treatment?

Yes. If the Hirer would have started that worker at the bottom of the payscale if recruiting them directly. However, if the worker's experience would mean starting further up the payscale if recruited directly, then that is the point at which they should be paid.

Starter grades which apply primarily, or exclusively, to Agency Workers may not be compliant, if they are not applied generally to direct recruits.

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

A Hirer has decided to increase the 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 and £10 per hour. Those recruited most recently being paid £8 per hour, with the higher rate being a reflection of greater on-the-job experience. The work involves no

---

<sup>6</sup> An employee has a contract of employment.

specialist skills and only minimal on-the-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?

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 payscales or structures and no 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 payscales or collective agreements. The Agency Worker is paid at the same rate before and after the 12-week qualifying period. Is this allowed?

Yes. There are no payscales or collective agreements, or a 'going rate'. Consequently, in relation to pay, there are no relevant terms and conditions included in the contracts of employment of employees in the Hirer. However, if, for example, the company gives all of its permanent employees 6 weeks' paid annual leave and paid time off for bank 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 ten-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?

Yes. If all rates really are individually negotiated, and there is no established custom and practice as regards pay. The Hirer and agency would need to be very clear that was the case. 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.

**Equal treatment on pay for Agency Workers who work through umbrella companies**

Where an Agency Worker works through an umbrella company, the pay they receive should be the same as if they had been recruited directly; or they should receive that which is paid to a comparator, if appropriate. Where an umbrella company worker receives part of their pay as reimbursement for travel expenses and, for example, where a directly recruited worker or employee would receive £100 per day, the umbrella worker must still receive £100 per day, but this can be made up of £80 plus £20 reimbursement of travel expenses.

## **5. Pay**

### ***At a Glance***

5.1 Having completed the 12-week qualifying period, the Agency Worker is entitled to the same basic terms and conditions that he/she would have received if recruited directly. This includes terms and conditions relating to key elements of pay. 'Pay', for these purposes, means sums of money paid to the worker in connection with the worker's employment. This guidance explains what is included and excluded in the definition of 'pay'.

### **(a) What 'pay' includes**

5.2 'Pay' includes:

- basic pay, based on the annual salary an Agency Worker would have received if recruited directly (usually converted into hourly or daily rate, taking into account any pay increments);
- overtime payments, subject to requirements regarding the number of qualifying hours;
- shifts and unsocial hours allowances, risk payments for hazardous duties;
- payment for annual leave (any entitlement above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate). To avoid confusion, this should be identified separately on the Agency Worker's payslip;
- bonuses or commission payments directly attributable to the amount or quality of the work done by the individual. This can include commission linked to sales, or production targets, and payments related to the quality of personal performance (see sections on bonuses linked to personal performance and performance appraisal systems). This might also include non-contractual payments which have been paid with such regularity that they are a matter of custom and practice; and
- vouchers or stamps which have monetary value and are not "salary sacrifice schemes" (i.e. luncheon vouchers and childcare vouchers).

### **(b) What 'pay' excludes**

5.3 'Pay' excludes:

- occupational sick pay (the Regulations do not affect an Agency Worker's statutory entitlement to Statutory Sick Pay);
- occupational pensions (Agency Workers will be covered by new automatic pension enrolment which will be phased in during 2012);

- occupational maternity, paternity or adoption pay (the Regulations do not affect an Agency Worker's statutory entitlements);
- redundancy pay (statutory and contractual);
- notice pay (statutory and contractual linked to loss of employment);
- payment for time off for Trade Union duties;
- guarantee payments as they apply to directly recruited staff if laid off;
- advances in pay or loans (i.e. for season travel tickets);
- expenses such as accommodation and travel expenses;
- payments or rewards linked to financial participation schemes, such as share ownership schemes or phantom share schemes;
- overtime or similar payments, where the Agency Worker has not fulfilled the qualifying conditions required of someone directly recruited. For example, an Agency Worker would have to be doing work over and above standard hours to qualify for overtime, not just working a shift that permanent staff tend to work on an overtime basis;
- the majority of benefits in kind (see reference to vouchers and stamps which have monetary value), which are given as an incentive or reward for long service. For example, where Building Society staff may be given a reduced rate mortgage or employer-funded training allowances);
- any payments that require an eligibility period of employment or service, if not met by the Agency Worker (same treatment as if directly employed), or if the Agency Worker is no longer on assignment when the bonus is paid (if the same applies to those directly recruited employees; i.e. no longer working for the Hirer);
- bonuses which are not directly linked to the contribution of the individual. For example, a flat rate bonus that is given to all directly recruited workers to encourage loyalty or long-term service; and
- additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice. See the section above on bonuses and commission payments.

### **(c) Bonuses linked to individual performance**

5.4 There are many different types of bonus or commission payments. The key question is whether the bonus, incentive payment, or reward is directly attributable to the amount/quality of work done by the Agency Worker. If it is for another reason other than the amount/quality of the work, such as to encourage the worker's loyalty or to reward long-term service, then it is outside the scope of the right to the same terms and conditions relating to pay.

5.5 Examples of bonus payments that would be **included**:

- commission payments linked to sales;
- bonuses payable to all directly recruited staff who meet a specific individual performance target; for example, in terms of calls handled in a given time; and
- bonuses payable on the basis of individual performance over a given period (e.g. during a reporting year).

5.6 Examples of bonus payments which would be **excluded**:

- bonuses which are determined by the overall performance of the company and, which are given to workers who have been with the Hirer for a number of years, would be excluded. These bonuses are not based on a worker's individual performance, such as:
  - bonuses which are determined by the overall performance of the part of the organisation where the Agency Worker has worked, where there is no recognition of individual contribution; and
  - bonuses designed to reward loyalty and service to the organisation and which are not based on individual performance.

5.7 Even where an Agency Worker does qualify for the bonus, they will not have to receive exactly the same bonus as any particular directly recruited worker, but should have the same opportunity to achieve a bonus, subject to their personal performance.

5.8 Where a bonus payment to a direct recruit would reflect performance and time served (e.g. if someone directly recruited and present for only six months of a reporting year would have received 50% of a bonus), that would also be the case for Agency Workers.

**(d) Performance appraisal systems**

5.9 The Regulations do not require integration of Agency Workers into the performance appraisal systems which are in place for someone who is directly recruited. It may be easier in some circumstances to fully integrate the Agency Worker, but it is not a requirement.

5.10 Conducting an appraisal of an Agency Worker's performance in the role, in order to determine this aspect of 'pay', should not in itself affect the worker's employment status. Such performance appraisal should, however, be conducted using the same criteria for directly recruited employees.

5.11 Where an Agency Worker qualifies for equal treatment in respect of a bonus that would normally be calculated on the basis of a performance appraisal system, alternative approaches could include:

- creating a simpler system to appraise Agency Workers. Agency Workers will normally have clear objectives to help them undertake the assignment which could form the basis of their appraisal, and this could be aligned to that used by the Hirer; or
- using an agency's existing appraisal/feedback system to keep track of their performance through regular discussion between the Hirer and the agency. This could be used to decide if an agency should get a 'standard' bonus, or one linked to high achievement.

### ***Illustrative Examples***

#### **Where an individual performance bonus is in the scope of pay**

A Line Manager is carrying out an annual individual assessment for a member of their team, using 4 criteria derived from their employee company values:

1. competence in performing role;
2. working relationships with internal and external stakeholders;
3. business achievement in terms of contribution to achieving company/unit targets; and
4. attendance record.

The bonus levels differ depending on performance: not met values (no payment); achieved values (£1,000 bonus); exceeded values (£2,000 bonus).

The Hirer will need to share the standard of the Agency Worker's performance with the agency.

If the award of the bonus requires a period of qualifying service, then the Agency Worker would also be subject to that period of service.

#### **Bonus following an eligibility period**

There is an eligibility period of service of 12 months for all employees, before they can receive a bonus. The Agency Worker will be entitled to the same treatment after 12 months.

This 12-month eligibility period is counted from the start of the assignment. As such, the Agency Worker does not have to work 12 months plus 12 weeks before they receive a right that a directly recruited employee would have received after 12 months.



### **The Hybrid (company and individual performance)**

In many cases, a bonus scheme is based initially on company performance or performance of specific business units to create a 'pot', and then awarded depending on individual performance (levels vary according to performance marking). This kind of scheme is likely to be within the scope of 'pay' under the Regulations, as it is awarded to directly recruited staff on the basis of performance, and is therefore linked to the amount/quality of work done by a worker.

If it is possible to identify part of an award linked solely to company performance (which should be out of the scope) and the part of the award linked to personal performance, then the Agency Worker will only be entitled to that part of the award that can be shown to be linked to personal performance.

### **(e) Annual pay award**

5.12 Where a Hirer gives an annual pay increment, an Agency Worker should receive the pay increment that they would have been entitled to, if recruited directly to do the same job. Therefore, the Agency and the Hirer need to keep in touch to ensure that Agency Workers receive the correct pay entitlements.

5.13 The requirement to provide this information could be included in relevant terms and conditions between agency and hirer.

### **Summary**

<b>What is included in 'pay'</b>	<b>What this means</b>	<b>Does not mean</b>
Basic Pay	'Pay for work done', annual salary usually converted in hourly/daily rate.  N.B. Some or all of the other contractual elements below may be added to this, including shift/unsocial hour/pay and risk payments for hazardous duties.	Occupational pension contributions, redundancy/severance, expenses; occupational sick pay; Occupational maternity, paternity, adoption pay.  N.B. Agency Workers are entitled to Statutory Sick Pay (paid by the Agency)
Overtime Pay	Extra pay for additional overtime hours.	An automatic entitlement for extra pay as an Agency Worker will still need to qualify for overtime as

		if recruited directly (where such criteria apply to the latter group).
Bonus or incentive payment linked to personal performance	'Pay for work done' and directly attributable to the individual.	Bonuses based solely on company performance; to encourage the worker's loyalty, or to reward long-term service.
Holiday Pay	Above the statutory minimum can be given as leave, or paid in lieu as part of the hourly/daily rate or at the end of the assignment.	Other contractual and statutory paid leave (i.e. compassionate leave, paid time off for union duties or jury service)  N.B. Unless employed by the Agency, who would be responsible for any such provision due.
Vouchers or stamps	Of fixed monetary value so another form of 'pay', such as luncheon vouchers.	Other benefits in kind: Financial Participation Schemes, Phantom Share Schemes.
Paid time off for ante-natal appointments	After the 12-week qualifying period, paid at full hourly rate for the time it takes to attend the appointment.	

## **6. Working Time and holiday entitlements**

### ***At a Glance***

- 6.1 This section covers what is included in working time and holiday entitlements.
- 6.2 Agency Workers already have a number of rights under the Working Time Regulations (Northern Ireland) 1998. In addition to these, after 12 weeks in a given job, an Agency Worker will be entitled to the same terms and conditions relating to the duration of working time, night work, rest periods and rest breaks, annual leave, and to be paid at the appropriate overtime rate as they would have received as a direct employee.

### **(a) Working Time entitlements (working time, night work, rest periods, breaks)**

- 6.3 Many Hirers may already offer some, or all, of these entitlements to Agency Workers from Day 1 of an assignment. For example, where a directly recruited employee would have had a more generous entitlement to rest than the statutory minimum requirement (i.e. a lunch hour, rather than the minimum 20 minutes rest during a shift of more than six hours), then an Agency Worker working the same shift will also be entitled to this, once the 12-week qualifying period has elapsed.
- 6.4 Duration of working time might cover a variety of conditions. For example, if someone directly recruited to the same job would not be expected to work more than 48 hours, then the Agency Worker should be offered the same terms and conditions.

### **(b) Paid holiday leave**

- 6.5 In relation to paid holiday leave, all workers have a statutory entitlement to 5.6 weeks per year (based on their working pattern: somebody working five days a week is entitled to  $5.6 \times 5 = 28$  days), which can include Bank Holidays and Public Holidays.
- 6.6 As with rest breaks, if a Hirer would have given a more generous contractual leave entitlement to the Agency Worker if he/she had been recruited directly to fill the same job, then the Agency Worker concerned should receive the same enhanced entitlement once the 12-week qualifying period has elapsed.

### **(c) Payment in lieu option**

- 6.7 There will be many differing entitlements to paid holiday leave provided by Hirers, and a possible way of simplifying the administration of this situation could be to deal with any additional entitlement (over and above the statutory entitlement) as a one-off payment at the end of the assignment, or included as part of the hourly/daily rate. Such arrangements would only relate to additional, contractual leave which is in excess of the statutory minimum.
- 6.8 It is important to remember that payment of the statutory entitlement to annual leave should be made when the leave is taken, to ensure that individuals do take the leave to which they are entitled. There will be no change to the existing law in this respect.

## **7. Pregnant Workers and New Mothers**

### ***At a Glance***

- 7.1 After completing a 12-week qualifying period in a given job, pregnant Agency Workers will be allowed paid time off to attend ante-natal medical appointments and ante-natal classes when on assignment.
- 7.2 In the event that a pregnant worker requests unpaid time off, prior to the completion of the 12-week qualifying period, to attend ante-natal medical appointments and ante-natal classes, agencies and hirers must act carefully, considering that other legislation may impose legal obligations on the agency and/or hirer in the circumstances. In particular, agencies and hirers should have regard to the pregnant worker's right under the Sex Discrimination (Northern Ireland) Order 1976.
- 7.3 If a pregnant agency worker can no longer complete the duties of the original assignment for pregnancy-related health and safety reasons, she has the right to be offered suitable alternative work (and paid at a rate that is not substantially less favourable than the rate for the assignment which was terminated on pregnancy-related health and safety grounds).
- 7.4 If suitable alternative work cannot be found, then the pregnant woman will have the right to be paid by the agency for the remaining expected duration of the original assignment. If suitable alternative work is offered and unreasonably refused by the agency worker, their entitlement to remuneration will cease.
- 7.5 This provision does not give the Agency Worker any additional entitlement to maternity, paternity or adoption rights, beyond those to which they are already entitled.

### ***Existing provisions***

- 7.6 An Agency needs to ensure that it does not discriminate when offering or providing its services. In the same way, Hirers need to ensure that they do not discriminate through the manner in which they engage workers. For example, it may be indirect discrimination if an agency refused to accept a woman on to its books because she only wanted to accept part-time work. Similarly, it may be indirect discrimination if an agency offered only very short-term placements to pregnant women, while offering longer placements to other Agency Workers. Case law indicates that it may be discrimination in certain circumstances, where a company fails to allow an Agency Worker to return to the temporary post which she had previously occupied, following absence due to maternity.

- 7.7 The intention of these provisions is to protect Agency Workers who are pregnant or who are new mothers, with the aim of allowing them to continue to work, and to ensure that women are not treated unfairly because of their pregnancy.
- 7.8 In light of existing provisions, for example, it would be discrimination if an agency refused to place a worker, or a Hirer refused to accept a worker, because she was pregnant. Similarly, it would be discrimination if a placement was terminated because of pregnancy, or if the worker was subjected to detriment because of her pregnancy.
- 7.9 This guidance applies to pregnant women, women who have given birth in the last six months, or women who are breastfeeding.

### ***Further information***

- 7.10 The following websites are recommended for further information:

Employment information: [www.nidirect.gov.uk](http://www.nidirect.gov.uk)  
Business information: [www.nibusinessinfo.co.uk](http://www.nibusinessinfo.co.uk)  
Health and Safety: [www.hseni.gov.uk](http://www.hseni.gov.uk)

### **(a) Responsibility of the pregnant Agency Worker**

- 7.11 The Agency Worker will need to first notify the agency of her pregnancy, and also in writing to the Hirer. The agency may wish to approach the Hirer on her behalf, and to ask for a health and safety risk assessment in her current assignment. In order to prevent any health and safety risks, it is in all parties' interests that these notifications and assessments take place at the earliest possible stage, rather than waiting until the 12-week qualifying period has elapsed. Indeed, this may be necessary under other legislation not covered in this Guidance.
- 7.12 If the Hirer identifies a risk, they will need to make an adjustment if it is reasonable. If it is not reasonable, the agency should offer suitable alternative work if available, and the Agency Worker should be given terms and conditions which last until the end of, and are not substantially less favourable than, the original assignment.
- 7.13 Should a pregnant Agency Worker unreasonably refuse the offer of suitable alternative work, then she will lose her right to pay for the remaining duration of the intended length of her first assignment.
- 7.14 The Agency Worker should inform the agency of any ante-natal appointments, so that she will continue to be paid at the usual hourly rate.

## **(b) Responsibility of the Agency**

- 7.15 If the nature of the assignment is such that a risk to health and safety is likely, the Agency will need to ask the Hirer to perform a workplace risk assessment and make a reasonable adjustment, if necessary.
- 7.16 If this is not possible, the Agency will need to ensure that the Agency Worker is paid for any period of the assignment when she could not work due to a health and safety risk while also seeking alternative suitable work with another Hirer.

## **(c) Responsibility of the Hirer**

- 7.17 When a risk assessment is required, it is the Hirer's responsibility to carry one out. Where a risk is identified, the Hirer is obliged to make adjustments to remove the risk.
- 7.18 If an adjustment is not possible or reasonable and would not remove the risk, the Hirer should inform the agency who will offer suitable alternative work, if available.

## **(d) Suitable alternative work**

- 7.19 The Agency Worker will need to be offered suitable alternative work, paid at a rate that is no less favourable than the last assignment, and in line with the type of work that she has agreed to undertake with the agency.
- 7.20 The clock will continue to tick and the pregnant Agency Worker will continue to accrue weeks in relation to both the original Hirer and the new Hirer where she is working in another role.

### ***If the agency does not have a suitable alternative role available***

- 7.21 In a case where an Agency Worker's assignment is ended on maternity-related health and safety grounds, if the agency is not able to find a suitable alternative assignment, the agency will be required to pay the Agency Worker at the same rate for the duration of the terminated assignment. If the end date of the assignment is not known, the agency will be required to pay the Agency Worker for what would have been the likely duration of the terminated assignment.

## **(e) Ante-natal appointments**

- 7.22 After a 12-week qualifying period in a particular job, an Agency will be required to pay an Agency Worker for time that she has to take off from an assignment in order to attend her ante-natal appointments. This should not, however, prevent Agencies from allowing paid time off for

such appointments prior to the 12-week qualifying period, if this is their normal practice.

- 7.23 The payment will be the Agency Worker's current hourly rate, and must be paid for each hour that she misses of her assignment. The Agency Worker can be required to provide evidence of her appointments (though not for the first appointment, which is usually to confirm the pregnancy). It is reasonable to ask an Agency Worker to give an estimate of how long an appointment will last and how long it will then take her to get to work.
- 7.24 Ante-natal care may include relaxation or parent craft classes, as well as medical examinations, if these are recommended by the Agency Worker's doctor.
- 7.25 You will need to bear in mind that ante-natal clinics can be busy places and patients are not always seen on time. The payment covers the entire appointment, including the time taken to and from the appointment if it is during assignment hours.
- 7.26 In the event of a dispute, it is preferable that these are resolved in the workplace at the earliest opportunity, thereby minimising the negative impact on working relationships, as well as the costs, stress, and time involved for all parties. If there is a dispute about whether someone is within the scope of the Regulations, the Labour Relations Agency is available to provide advice and assist in pre-claim conciliation processes (see Alternative Dispute Resolution).



## **8. Pay between assignments a.k.a. 'Swedish Derogation' (regulation 10)**

### ***At a Glance***

- 8.1 There is an **exemption from equal treatment provisions on pay (and holiday pay)**, where an Agency can offer an Agency Worker a permanent contract of employment and pay the Agency Worker between assignments (i.e. during the periods when they are not working, when there are no available suitable assignments for the Agency Worker). This means that after 12 weeks in a given job, the Agency Worker will not be entitled to the same pay as if they had been recruited directly.
- 8.2 However, the Agency Worker must receive Day 1 rights, as these apply regardless of whether an Agency Worker is on a pay between assignments contract. The exemption only covers pay. The agency worker would also be entitled to other equal treatment rights if the qualifying period has been completed.
- 8.3 The Agency must explain this to the Agency Worker, so they can make an informed decision as to whether they are willing to agree to forgo this right and enter into a permanent contract with them. In any event, the contract of employment has to contain a statement to the effect that entering into such a contract means that the Agency Worker does not have any right to equal pay, as set out in the Regulations.
- 8.4 The rate of pay between assignments must be at least 50% of on-assignment pay, at least the National Minimum Wage (NMW), and calculated using a reference period. The reference period is usually the 12 weeks immediately preceding the period of pay between assignments. The protections under this provision are in addition to a wider range of statutory employment rights available to employees.

### **(a) New entitlements**

- 8.5 All Agency Workers, including those covered by this pay between assignments exemption, are entitled to other new provisions under the Regulations. In particular, equal treatment in relation to the duration of working time, night work, rest periods and rest breaks and annual leave after 12 weeks. In these circumstances, the annual leave entitlement is to time off rather than pay. The paid annual leave entitlement will be as set out in the contract of employment between the Agency and the Agency Worker.

### **(b) Permanent contract of employment**

- 8.6 To qualify for this exemption, the Agency Worker must be given a **permanent contract of employment** with the Agency and agree the

terms and conditions that will apply across assignments, and the level of pay between these assignments. There is no requirement to pay the Agency Worker before the first assignment has begun.

8.7 These contracts must comply with the requirements of the Regulations regarding certain specified conditions such as:

- minimum pay rates and their basis of calculation;
- location of work, reflecting where the Agency Worker is willing to travel;
- minimum and maximum expected hours (i.e. an Agency Worker may only be available for 2 days per week so a 5-day assignment would not be 'reasonable');
- they must provide for at least one hour of work per week;
- nature of work; and
- a statement that makes clear that the Agency Worker is foregoing equal treatment rights, insofar as they relate to pay.

8.8 Additionally, the pay between assignments must be at least 50% of assignment pay, based on the previous 12 weeks, and not below the NMW. It applies to the calendar weeks between assignments, where the Agency Worker is available to work but has no assignment, and such pay is calculated at the highest pay rate and hours enjoyed in the course of the previous 12 weeks, where the previous assignment lasted longer than 12 weeks, or during the previous assignment where it was shorter than 12 weeks.

***Pay between assignments - when it does and does not apply***

8.9 The pay between assignments derogation does not apply to periods between two short assignments which fall within the same week. This reflects the fact that the Regulations provide that any week during which an Agency Worker works during an assignment covered by the derogation contract, counts as a full calendar week (i.e. allowing a worker on a derogation contract to accrue service towards the 12-week qualifying period for other relevant terms and conditions apart from those relating to pay).

8.10 Payments between assignments must be at least 4 weeks' pay before the contract is terminated. If the contract is still running and the Agency Worker is between assignments, then the pay must continue to maintain the contract. Clearly this may exceed the 4 weeks' minimum.

***Anti-avoidance measures***

8.11 The Regulations refer to contracts of greater than 'one hour' per week, in order to demonstrate that providing a 'zero hours' contract (which may not provide a sufficient amount of mutuality of obligation, required in an employer/employee relationship) will not meet the requirements of the derogation contract.

8.12 The pay between assignments derogation is designed to be used where an Agency Worker has a contract of employment with an Agency, and is paid during the weeks when the worker is not assigned to a Hirer. It is because of this pay when the worker is not assigned, that the Regulations provide for the derogation from equal treatment on pay. Agencies and Hirers should not structure arrangements in a way that deprives Agency Workers of the protection provided by pay between assignments. This could put them at the risk of legal challenge.

### ***Illustrative examples***

If an Agency were to pay the Agency Worker for a short period (which might be as little as 1 hour) when in reality there is no assignment available, a worker could argue that they were not working under the supervision and direction of the Hirer, and so the obligations in the Regulations to pay the Agency Worker between assignments applies.

If the hours that an Agency offers differ from the expected hours of work included in the contract, this could likewise result in a challenge.

8.13 If there is no permanent contract of employment between the Agency and the Agency Worker which complies with the requirements of the derogation, then the Agency Worker could be entitled to the equal treatment provisions under the Regulations which apply in the absence of such a contract. In the event of a successful claim, the Agency (and/or the Hirer) will be responsible for any breach (and associated penalties) to the extent that they are responsible for the infringement. This will depend on the circumstances of individual cases.

### **(c) Rate of pay between assignments**

8.14 The Agency Worker will need to receive at least 4 weeks' pay between assignments (at the 50% rate or NMW) before the contract is terminated. The agency must take reasonable steps to find a suitable assignment and, where it does this, the Agency Worker will not be able to complain of a breach of the agreement, or allege that they have a right to equal treatment on pay.

### ***A suitable offer of work***

8.15 From the outset, and before the first assignment, the Agency and the Agency Worker will need to discuss, agree, and note in a written contract what the Agency Worker is willing to accept on any particular assignment. If an Agency Worker refuses a suitable assignment, then depending on the circumstances and the contract between the Agency Worker and the Agency, the Agency Worker may not be available for

work and therefore would not be entitled to receive pay between assignments.

#### **(d) Ending a pay between assignments contract**

8.16 If the Agency wants to terminate the contract, it must first satisfy the requirement for the Agency to give 4 weeks' pay to the Agency Worker. The 4 weeks' pay must be paid before the Agency can terminate the contract. The contract can end earlier other than by termination by the Agency (e.g. if the Agency Worker resigns<sup>7</sup>).

8.17 If the obligation to pay 4 weeks' pay has been met during the duration of the contract, then it does not have to be paid again at the end of the contract. For example, a contract has been running for a year, during which time the Agency Worker has been paid between assignments for at least 4 weeks. At the end of the contract, no further payment under these Regulations is required. Other contractual obligations (i.e. notice pay) may apply which are outside of these Regulations.

#### **(e) Pregnant workers working on a pay between assignments contract**

8.18 The maternity provisions, where a worker is suspended for health and safety reasons, apply for the length of the original intended duration of the assignment, or likely duration of the assignment, whichever is the longer.

8.19 Once these provisions no longer apply (i.e. they would not otherwise be performing the original assignment), the pay would be determined by the pay between assignments contract.

#### ***Illustrative examples***

**An Agency Worker works on a production line, but the Hirer decides they do not need the Agency Worker during a quiet period. The Agency Worker returns when the work picks up.**

The Agency pays the Agency Worker for the weeks where there is no work, in the event that they cannot find the Agency Worker alternative work as set out in the contract of employment.

**When an Agency cannot find work for an Agency Worker.**

An Agency Worker works for a Hirer for 4 weeks at £10 per hour for 40 hours. The Agency cannot find the Agency Worker a suitable job the next week, so the Agency Worker is entitled to at least 50% of the rate of pay, as long as it is

---

<sup>7</sup> If the agency worker resigns no payment is required as the agency worker rather than the Agency has terminated the contract.

at least the NMW. Consequently, the Agency Worker is entitled to 40 hours x the NMW, and will be paid until the Agency finds the Agency Worker alternative work, or terminates the contract. In all circumstances, the Agency Worker must have received at least 4 weeks' pay between assignments, either during the contract, or at the end of the contract.

## **9. Information requests, liability and remedies**

### ***At a glance***

9.1 This section covers:

- The information required by an Agency before placing an Agency Worker on assignment;
- When an Agency should ask the Hirer for information about basic working and employment conditions following 12 weeks in a given job;
- Compliance information required by an Agency from a Hirer;
- What steps the Agency Worker can take to obtain information from the Agency and Hirer;
- What happens if an Agency Worker does not receive a response to their request and if they are unsatisfied with the response;
- Alternative Dispute Resolution; and
- How a claim to an Industrial Tribunal is dealt with, given multiple parties are involved, and penalties that a Tribunal might award.

9.2 It is preferable for disputes to be resolved in the workplace at the earliest opportunity, thereby minimising the negative impact on working relationships, as well as the costs, stress, and time involved for all parties. The Labour Relations Agency (LRA) is available to assist in pre-claim and post-claim conciliation processes (see Alternative Dispute Resolution).

### **(a) Information an Agency must have before supplying an Agency Worker**

9.3 For each vacancy which an agency receives from the Hirer, they must record details about the vacancy before they introduce or supply an Agency Worker to that Hirer. Such details include those required by separate, pre-existing legislation: the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 (the 'Conduct Regulations'). Further details are included in the next section. The Gangmasters Licensing Regulations also apply in the food, agricultural and shellfish sectors.

### ***When an Agency should ask a Hirer for information about basic working and employment conditions***

9.4 It may be clear at the beginning of an assignment whether it will last for more than 12 weeks, and it is good practice for the Agency to request information at an early stage, even in advance of the assignment starting. However, this is a matter between the Agency and the Hirer,

and no timescale has been set out in the Regulations. This is to provide flexibility.

- 9.5 In some instances, the assignment may be initially scheduled to last for less than 12 weeks, but is subsequently extended. In this situation, the Agency should contact the Hirer to obtain information, as the Agency Worker can request information in writing any time after the 12 weeks have elapsed. In the event of multiple Agencies being involved in the supply of the Agency Worker, the Agency who has the direct contractual relationship with the Hirer should undertake this action.

## **(b) Compliance information required by an Agency from a Hirer**

- 9.6 An Agency cannot supply an Agency Worker to a Hirer without certain information. This is required under existing legislation (the Conduct Regulations) and includes:

- the identity of the Hirer, nature of business, and location;
- start date and duration of assignment;
- job role, responsibilities and hours;
- the experience, training and qualifications and any authorisation which 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 what steps the Hirer has taken to prevent or control such risk; and
- any expenses payable by or to the work-seeker.

- 9.7 In addition, a Hirer will need to provide the Agency with the following details, in order to comply with these Regulations (usually found in standard Terms and Conditions or in a Company Handbook), if and when an Agency Worker completes 12 weeks in a given job:

- the level of **basic pay** (based on the annual salary an Agency Worker would have received, as if recruited directly), if and when there are **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, as well as information on annual pay increments);
- if they offer **vouchers** which have monetary value; and
- **annual leave entitlement**.

- 9.8 It might be useful for agencies to seek terms and conditions for comparable employees at the same time as they are obtaining the requisite information to supply the Hirer with an agency worker. In any event, as the right to equal treatment begins in week 13, this information should be provided promptly; when it is clear that the assignment will last more than 12 weeks.

9.9 Whilst day one entitlements are the responsibility of the Hirer, it may be useful for the Agency to enquire about the collective facilities and amenities on their premises, and how they provide information on their job vacancies. However, this is a matter for the Agency and the Hirer to agree.

### **(c) Working through multiple Agencies**

9.10 It is essential that correct information about the Hirer is supplied from one Agency to another, where there are intermediaries involved in the supply of an Agency Worker, such as master or neutral vendor arrangements, or umbrella companies (who are classed as Agencies under the Regulations). In the event of a Tribunal claim, the Tribunal would decide which party was responsible for any breach to the extent that it is responsible for the infringement.

### **(d) Process for an Agency Worker to obtain information**

9.11 Agency Workers are entitled to information relating to their equal treatment rights, if they believe their rights under the Regulations have been infringed. This process depends on what aspect of equal treatment they are requesting information on.

9.12 If it is in relation to **Day 1** entitlements (such as access to information on vacancies or access to collective facilities or amenities), then the requirement to provide information lies with the Hirer, and information can be requested any time after the start of the assignment. A Hirer might provide information directly to the Agency which, in turn, passes it to the Agency Worker in advance of the assignment starting. Alternatively, the Hirer might issue information as part of the induction of Agency Workers. However, that is a matter for the Hirer and the Agency.

9.13 If an information request is in relation to rights **after the 12 week qualifying period**, then the requirement to provide information lies with the Agency, and the Agency Worker can only request information after the 12 weeks have elapsed.

9.14 Agency Workers should be encouraged to talk to the Agency in the first instance, as the Agency will often be able to resolve difficulties without resorting to formal procedures, or to liaise with the Hirer to ensure that the Agency Worker receives the information. Agencies and Hirers may wish to consider devising some form of informal information-sharing protocol and dispute resolution mechanism, by way of good practice standards, although that is a matter between the agency and the hirer.

9.15 Under the Regulations, an Agency Worker can take the following action in relation to Day 1 entitlements (for example, access to facilities such as child-care or car parking). The Agency Worker should



approach the Hirer directly, with a written request for information before making a claim. The Hirer has 28 days to respond in writing from receipt of the request.

**9.16 The Hirer must provide:**

- a written statement with all relevant information relating to the rights of a comparable worker or employee; and
- reasons for the treatment of Agency Workers.

9.17 For access to collective facilities and amenities, the Hirer may have good reasons why the Agency Worker is treated differently. This is permissible, but can be challenged. Different treatment requires objective justification. Essentially, Hirers would have to ask themselves: "Is there a good reason for treating the Agency Worker less favourably?" Cost may be a factor but, by itself, is unlikely to justify different treatment. Practical considerations could be a factor; for example, the child care facility may be at full capacity. Where there is a waiting list system, then the Agency Worker should be treated in the same way as a comparable employee or worker.

9.18 If the request is in relation to basic working and employment rights, which are applicable after 12 weeks in a given job, the Agency Worker cannot request information until the 12 weeks have elapsed. In this instance, the Agency Worker can request a written statement from the Agency about any aspect of equal treatment which they do not consider they were receiving before making a claim.

**9.19 The Agency has 28 days from receipt of the request to respond in writing to the Agency Worker, setting out:**

- relevant information relating to basic working and employment conditions; (rate of pay, number of weeks of holiday as set out in company handbooks, usual contractual terms etc.);
- any relevant information or factors that were considered when determining the basic working and employment conditions; for example, if there is a pay scale, where the Agency Worker is put on the pay scale;
- where the equal treatment is based on a 'flesh and blood' comparable employee (doing the same or similar work), the information describes the Terms and Conditions applicable to that employee, explains any difference in treatment; for example, lower rate of pay based on lower level of qualifications, skills, experience and expertise.

***If an Agency Worker does not receive a written statement about basic working and employment conditions***

9.20 If an Agency Worker has not received a written statement within 30 days of making that request, the Agency Worker can then write to the

Hirer, requesting the same information. The Agency Worker has to wait until the Agency has had the opportunity to respond and to take reasonable steps to obtain the information, before approaching the Hirer.

**Summary**

<b>Entitlement</b>	<b>Who must provide written information</b>	<b>When can the Agency Worker challenge their treatment on assignment</b>
Can I use the company car park? Can I use on-site child-care facilities?	Hirer	<p align="center"><b>Day 1</b></p> <p>The Hirer has 28 days from receipt of the written request to respond in writing</p>
I do not consider I am receiving the correct holiday entitlement/rate of pay.	Agency in first instance; then the Hirer.	<p align="center"><b>Once the Agency Worker has qualified for equal treatment.</b></p> <p>If a written response is not received from the agency within 30 days of making the request, the Agency Worker can write to the Hirer, who then has 28 days from receipt to respond.</p>

***If an Agency Worker is unsatisfied with the response or does not receive a response***

9.21 An Agency Worker can bring a claim to an Industrial Tribunal in relation to their rights under the Regulations. The Tribunal can draw an adverse inference from the fact that a requested written statement was not provided. The Agency Worker can bring a claim without making a written request, but should be encouraged to seek information and advice from the LRA and perhaps avoid making a claim.

9.22 A Tribunal will not consider a complaint under the Regulations unless it is presented within 3 months of the actual breach (a Tribunal may still consider a complaint if it is just and equitable to do so).

9.23 If matters cannot be informally or internally resolved, there are liabilities and remedies within the legislation which are dealt with later in this section of the guidance. However, prior to moving to what may be costly legal processes, Agencies, Agency Workers and Hirers may wish to consider engaging in Alternative Dispute Resolution which can

be facilitated by the Labour Relations Agency. The following section explains how this optional process can work.

## **(e) Alternative Dispute Resolution**

- 9.24 The LRA is an independent, publicly-funded organisation, whose job it is to promote good employment relations in Northern Ireland. To help resolve matters without the need for a legal determination at a tribunal, the LRA is available to assist in pre-claim and post-claim conciliation processes (i.e. both before and after a tribunal claim has been lodged).
- 9.25 Preparing for responding to a Tribunal claim takes considerable time and effort and, if there is a Tribunal hearing, Agencies, Hirers and Agency Workers could have representational costs. Almost everyone finds the process of pursuing or defending a case challenging, and appearing before a Tribunal can be a stressful experience. Furthermore, a Tribunal can result in an irreparable breakdown in the relationship between the parties involved. In light of all of this, it is preferable for any conflicts about employment rights issues to be resolved before the process has reached a Tribunal stage.
- 9.26 Where a problem or disagreement under these Regulations is likely to lead to a Tribunal claim, the LRA will often be able to help Agency Workers, Agencies and Hirers find a solution that is acceptable to all parties. The LRA will not impose outcomes or make judgements on the rights or wrongs of the matter in dispute. Instead, they will simply try to help the parties settle their differences.
- 9.27 The key features of the LRA's service in this respect are that it is impartial, voluntary, confidential, independent, and free. The service will:
- explain the conciliation process;
  - explain the way in which Tribunals operate, and what they take into account in deciding claims in similar circumstances;
  - discuss the options;
  - ask questions to help clarify the Agency's/Hirer's and Agency Worker's positions and concerns;
  - help each person understand how the other views the case; and
  - relay any proposals for a settlement between the Agency/Hirer and the Agency Worker.
- 9.28 If an agreed solution cannot be found, the Agency Worker may still choose to lodge (or continue with) a tribunal claim.
- 9.29 The LRA's Conciliation and Arbitration Department can be contacted by telephoning: (028) 9032 1442 (Option 2) or by visiting its website: [www.lra.org.uk](http://www.lra.org.uk)

## **(f) Liability and remedies**

### ***Responsibilities in the event of a claim***

- 9.30 Liability rests with the Hirer for failure to provide Day 1 entitlement. The Agency will not be held liable, because they do not have a role in delivering these entitlements, as the Agency has no influence or role in, for example, providing access to a company canteen.
- 9.31 For failure to provide basic working and employment conditions, liability can rest with either the Agency (or Agencies, where there are more than one involved in the supply of the Agency Worker) and/or the Hirer, to the extent that each is responsible for the failure. Even if the Agency will be initially responsible for the breach of the equal treatment principle, it will have a defence if it can show that it obtained, or took 'reasonable steps' to obtain, relevant information from the Hirer about its basic working and employment conditions, and treated the Agency Worker accordingly. If the Agency can establish this defence, then the Hirer will become liable for that liability which would have been the Agency's.
- 9.32 The Hirer will be liable for any breach to the extent that it is responsible for the infringement. Therefore, if a Hirer had failed to provide information to the Agency about basic working and employment conditions, or provided incorrect information, and the Agency Worker was not receiving appropriate treatment under the Regulations, then the liability could be the sole responsibility of the Hirer.
- 9.33 It is therefore in the interests of all parties to exchange information in a timely manner. As a matter of good practice, Agencies should put in place reminders so they can check with the Hirer if there have been any changes to Terms and Conditions and pay rates which affect Agency Workers. Similarly, Hirers should notify Agencies when they amend their basic working and employment conditions; for example, pay and bonus reviews.
- 9.34 In a Tribunal claim, where the responsibility for a breach of the Regulations is not clear, or has not been conceded, as between the Agency and Hirer, the Agency Worker may claim against both the Agency and the Hirer at the outset. This does not mean that a Tribunal can be asked to find that there is 'joint and several liability' for breaches. The Regulations ensure that any party in the chain of relationships (i.e. an Agency or a Hirer) can be named at the outset, or joined to a claim and be liable to the extent that the Tribunal finds they are to blame for the infringement.

### ***If a Tribunal upholds an Agency Worker's complaint***

- 9.35 The Tribunal will generally be able to award financial compensation (and penalties in certain circumstances), make a declaration setting out

the Agency Worker's rights in relation to the complaint, and/or recommend that the Hirer/Agency takes certain action to remove the adverse effect on the Agency Worker.

### ***What an Agency Worker will receive***

- 9.36 The Agency Worker will be compensated for any loss of earnings related to their rights under the Regulations, or receive an appropriate level of compensation; for example, where they have been denied access to a facility. There is no maximum award, but there is a minimum award of two weeks' pay (as defined by the terms covering that assignment), regardless of the value of the loss, unless a Tribunal finds that the Agency Worker behaved unreasonably, having the power to reduce the award if it is just and equitable.
- 9.37 Where the agency was unaware that there had been previous service with a Hirer in a particular post that could be aggregated with new service proposed at that Hirer, this could mean that the 12 week qualifying period would be reached earlier. This situation could arise where the Hirer was a large company, or where the company has multiple sites. If an Agency Worker arrives on site for a new assignment and realises they have been engaged there previously, they should be encouraged to inform the Agency straight away.
- 9.38 If an Agency Worker brings a claim and has not told the agency or Hirer they worked for the Hirer before (and were therefore already entitled to equal treatment or qualified before the 12 weeks elapsed), a Tribunal can take this into account when deciding the level of compensation in any claim.

### ***Anti-avoidance measures to encourage compliance***

- 9.39 The Regulations contain an 'anti-avoidance' provision which is designed to prevent structures of assignments that are put in place to intentionally circumvent the Regulations.
- 9.40 In all circumstances, in order for the anti-avoidance provisions to become relevant, the Agency Worker must have completed at least two assignments or two roles (in substantively different roles which break the qualifying period) with the same Hirer, or connected Hirers within the same group.
- 9.41 Factors which would indicate that a pattern of assignments was structured with the intention to deprive the worker of equal treatment rights could be:
- the number of assignments;
  - the length of assignments;
  - the number of role changes;
  - whether the role changes were substantively different; and

- the length of break periods.

9.42 It would still be for a Tribunal to decide whether the pattern of assignments indicated an intention to deprive the worker of his/her rights. Any Tribunal decision would weigh evidence from the Agency Worker that one or more of the factors applied, against evidence from the Hirer/agency that the motivation behind the pattern was different and legitimate. In these circumstances, the Tribunal may make an award of up to £5,000.

***Illustrative Example***

**An Agency Worker makes a claim after being rotated between companies that are legally connected in the same group, into similar roles with regular frequency.**

If this happens, the Industrial Tribunal may consider that the motivation behind this action was to deprive the Agency Worker of equal treatment. In these circumstances, the Agency Worker will be deemed to have completed the 12 week qualifying period, or will retain the right to equal treatment.

This could result in a penalty of up to £5,000 against the Hirer or Agency, or split between parties in a way the Tribunal considers just and equitable.

## **10. Other Factors**

10.1 This section covers other factors that are affected by The Agency Workers Regulations (Northern Ireland) 2011:

- Thresholds for bodies representing Agency Workers. From 5 December 2011, temporary Agency Workers will count towards the thresholds in Agencies for the purposes of calculating the thresholds above which a representative body may be established. This will not apply to Agency Workers that are employees of the Agency.
- Informing workers' representatives. You must provide relevant information on the use of Agency Workers supplied in all the situations where there is currently an obligation on employers to provide information on the employment situation.

### **(a) Thresholds for bodies representing Agency Workers**

10.2 Employees have a number of rights to establish bodies to represent their interests in discussions with management. The rights are not automatic and depend on threshold provisions, which establish the minimum number of workers or employees which an organisation must employ, before they come into effect.

10.3 The laws that establish these rights do not state that representative bodies should automatically be established. They allow employees to instigate a procedure which may lead to the establishment of a representative body.

10.4 The Directive does not give new representational or consultative rights to temporary Agency Workers. The Directive requires Agency Workers to count towards the calculation of the thresholds, above which the existing rights in these areas are calculated. In Northern Ireland, this will apply to the agency (or agencies) where the worker is registered, and not to the Hirer.

10.5 If a temporary Agency Worker has a relationship with two or more agencies, the Agency Worker could potentially count towards the threshold of both because they may have ongoing relations with both of them. However, if a person 'on the books' of the Agency has not been supplied to a Hirer or an intermediary by the agency, they cannot subsequently be included in the thresholds count, as they will not meet the definition of an 'Agency Worker'.

### ***Representative bodies***

10.6 There are various types of representative bodies which are established to enable employers and employees to communicate, consult, and negotiate effectively with each other. These include ongoing broad-topic bodies such as European Work Councils and

Information and Consultation representative bodies, and also those set up for specific issues, such as Transfer of Undertakings (TUPE) representative bodies and Health and Safety representative bodies.

- 10.7 The law does not apply to the establishment of a representative body for the purposes of collective redundancy. Because they are not employees, temporary Agency Workers cannot in the legal sense be made redundant, and cannot therefore be counted towards such a threshold.
- 10.8 If you are an Agency, you will need to consider the qualifying points after which a temporary worker may be entitled to be counted towards the threshold count for the purposes of establishing a representative body at your agency.

### **(b) Informing workers' representatives**

- 10.9 There are various situations where you have a statutory obligation to provide information to employees and their representatives about the employment situation at your business. This includes ongoing mechanisms such as the Joint Consultative Committees and European Works Councils. It also covers issue-specific situations, including collective redundancies and Transfer of Undertakings (TUPE) situations.
- 10.10 The Regulations provide that, where information is provided on the employment situation, information should also be provided on the use of Agency Workers. The information must be provided to employees or their representatives.
- 10.11 **Information must include:**
- the total number of Agency Workers engaged;
  - the areas of the business in which they are used; and
  - the type of work they are contracted to undertake.
- 10.12 The definition of information to be provided does not include information on Agency Workers' terms and conditions.
- 10.13 In addition to the various pieces of legislation that have been amended, you have a statutory duty to provide information relating to temporary Agency Workers under the Health and Safety at Work (Northern Ireland) Order 1978<sup>8</sup>.
- 10.14 As a Hirer, you will need to put in place processes to manage the additional administrative procedures that this requires. You will also

---

<sup>8</sup> 1978 No. 1039 (N.I.9).



need to know your obligations and the financial penalties which may apply if the legislation is breached. Further details on statutory obligations can be found on the employment legislation page of the LRA website: [www.lra.org.uk](http://www.lra.org.uk)

## **11. Feedback**

11.1 If you wish to comment on the content of this guidance you can write to:

Conor Brady  
Head of Employment Relations Policy and Legislation  
Department for Employment and Learning  
Room 312  
Adelaide House  
39 – 49 Adelaide Street  
Belfast  
BT2 8FD

Tel: 028 90 25 7556  
Fax: 028 90 25 7555  
Email: [conor.brady@delni.gov.uk](mailto:conor.brady@delni.gov.uk)

## **APPENDIX A – AGENCY TO HIRER LETTER**

### **Information sought in regard to the Agency Workers Regulations (NI) 2011**

In order to assist us (the Agency) to comply with our obligations under the Agency Workers Regulations (NI) 2011, can you (the Hirer) please provide the following information in regard to the Agency Worker and the assignment?  
*[Agencies should seek this information at the same time as they notify the hirer of a work placement.]*

**Name of Agency Worker**

**DoB of Agency Worker**

#### **Part A - Previous work with the Hirer**

Has this Agency Worker previously completed an assignment with you or any other Hirers connected to you:

Yes / No

If Yes, please complete the following section for each previous occasion:

Start Date	
End Date	
Job Title	
Type of Work / Duties	
Location	
Hours per week	
Experience, training or qualifications	
Hourly rate of pay	

*[If it appears that a qualifying period begun in an earlier assignment with the hirer should continue in the new assignment, a discussion should take place between Agency and Hirer as to the nature of the previous role; if it was substantively different or broadly similar work. These discussions and any decisions made as a result should be recorded and retained.]*

#### **Part B – Basic terms and conditions to which Agency Worker would be entitled if hired directly**

*[Once a Worker has completed 12 continuous calendar weeks during one or more assignment(s), they will be entitled to the same basic working and employment conditions as if they had been recruited directly by the hirer or if a comparable employee can be identified. A comparable employee is such in relation to an agency worker if:*

- *both the employee and agency worker are working for and under the supervision of the hirer;*
- *are engaged in the same or broadly similar work, taking account where relevant of whether they have a similar level of qualifications and skills;*
- *works in the same establishment as the agency worker, or works at a different establishment but meets the first two criteria.]*

Please provide the relevant Terms and Conditions that are ordinarily included in the contracts of employees/workers of the hirer, who have been recruited directly to do the same job. Or, in regard to a comparable employee, please provide details of:

1. Pay (a) fee (b) bonus (c) commission (d) holiday pay (e) other	
2. Duration of working time	
3. Night work	
4. Rest periods	
5. Rest breaks	
6. Annual leave	

**[Important to note:**

*This template is illustrative and indicative only. It is not mandatory to use it and agencies and hirers must comply with the regulations in a manner appropriate to the circumstances of each individual case.]*



people:skills:jobs:



Department for  
**Employment  
and Learning**  
[www.delni.gov.uk](http://www.delni.gov.uk)



INVESTOR IN PEOPLE

**THE DEPARTMENT:**

Our aim is to promote learning and skills, to prepare people for work and to support the economy.

This document is available in other formats upon request.

**Further information:**

telephone: 028 9025 7580

e-mail: [employment.rights@delni.gov.uk](mailto:employment.rights@delni.gov.uk)

website: [www.delni.gov.uk](http://www.delni.gov.uk)