

**AGENCY WORKERS  
REGULATIONS**

Guidance

MAY 2011

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# Introduction

## At a glance

This section covers:

- Aim of guidance
- When the law changes
- Quick start

## Aim of guidance

This aim of this guidance is to help both hirers of agency workers and the recruitment sector to understand the Agency Workers Regulations and the implications and responsibilities for both hirers and temporary work agencies.

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

## When the law changes

The legislation comes into force on 1 October 2011, giving agency workers the entitlement to the same basic employment and working conditions as if they had been recruited directly, if and when they complete a qualifying period of 12 weeks in the same job.

It is not retrospective and for those agency workers already on assignment, the 12 week qualifying period will start from 1 October 2011.

From the 1 October 2011, agency workers will also be entitled to access to facilities and information on job vacancies from Day 1 of their assignment.

## Quick start guide

### New entitlements for agency workers from 1 October 2011

The information below outlines the key changes and new responsibilities

#### New entitlements

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

**After 12 weeks in the same job:** The equal treatment entitlements relate to **pay** and other **basic working conditions** (annual leave, rest breaks etc) and come into effect after an agency worker completes a **12 week qualifying period** in the same job with the same hirer. After completing the qualifying period, pregnant agency workers will now be allowed to take paid time off for ante-natal appointments during an assignment.

It is **not** retrospective and for those agency workers already on assignment, the 12 week qualifying period will start **from 1 October 2011**.

#### What this means for you

**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 facilities and are able to view information on your job vacancies from the first day of their assignment with you.

**If you are a 'temp' agency worker:** From 1 October 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. You can accumulate these weeks 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 [direct.gov](http://direct.gov) website).

**If you are a temporary work agency:** If you are involved in the supply of temporary agency workers, you need to 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) so that they are treated as if they had been directly recruited to the job.

# Scope

## Regulations 2-4

### At a glance

The Agency Workers Regulations apply to:

- individuals who work as temporary agency workers;
- individuals or companies (private, public and third sector eg charities, 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)

This section considers who is covered by the Regulations and those who are likely to be outside the Regulations together with illustrative examples.

Covered in this section;

Definition of who is covered by the Regulations

- **Temporary Work Agency (TWA)**
- **Agency worker**
- **Hirer**

Those who are likely to be outside the scope of the Regulations include;

- individuals who find work through a temporary work 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)
- individuals working on Managed Service Contracts where the worker does not work under the direction and supervision of the host organisation
- individuals 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)
- individuals who find direct employment with an employer through an “employment agency”
- individuals 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 supervision and direction of another party

These Regulations apply to Great Britain. Northern Ireland has separate Regulations in line with their national law.

If there is a dispute about whether someone is within the scope of the Regulations, an Employment Tribunal will consider if the description of the arrangements reflects the reality of the relationship.

## In scope

### The Temporary Work Agency (TWA)

A **temporary work agency (TWA)** 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 TWA. Under the Regulations a TWA 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** such as an **umbrella company** or a **master or neutral vendor** if they are involved in the supply of the agency worker.

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 a TWA, is covered by the Regulations. The individual will usually have an overarching employment contract with the umbrella company with full employment rights and the employee’s income generally being treated as employment income. However, that will not prevent the individual from benefitting from these Regulations.

#### **Involvement of other parties in the supply of agency worker**

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.

Master or neutral vendors fall within the legal definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals.

**It is important that the correct information from the hirer is shared between parties in the chain of supply of the individual agency worker in order to ensure that whoever actually pays the agency worker is aware of their entitlement, provided by the Regulations, to the basic terms and conditions that they would have received had if they had been directly recruited. See section on information requests for more detail.**

### The Agency Worker (AW)

An agency worker (often referred to as a ‘temp’) is someone who has a contract with the TWA (an employment contract or a contract to perform work 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 who is covered by them.

The key elements required for someone to be an agency worker are:

- there is a contract (an employment contract or a contract to perform work personally) between the worker and a TWA;
- that worker is temporarily supplied to a hirer by the TWA; and
- 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)

### **Illustrative examples**

#### **Example characteristics of an agency worker (AW)**

- ✓ The AW works for a variety of hirers on different assignments but is paid by the TWA who deducts tax and NICs (National Insurance contributions)
- ✓ The AW has a contract with the TWA but works under the direction and supervision of the hirer
- ✓ Time sheets are given to the TWA who pays the AW for the hours worked
- ✓ If an AW is on sick leave, the TWA pays the Statutory Sick Pay (subject to satisfying the criteria applicable to all workers)
- ✓ The TWA 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 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

## **The hirer**

The hirer (end-user) is a “person” – eg company, partnership, sole trader, public body - which is engaged in economic activity (whether or not for profit) and which books agency workers via a TWA. The hirer is responsible for supervising and directing the agency worker while they undertake the assignment. A hirer will have its own legal identity – so a division within a company will not be a separate hirer if it does not have its own legal identity.

## Out of scope

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?**

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 or customer of the individual (i.e. a genuine business to business relationship). A profession 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 or direction. But 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.

### **Simply putting earnings through a limited company would not in itself put individuals beyond the possible scope of the Regulations.**

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

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 have devised a number of tests which 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, to establish the reality of the relationship.

If the arrangements do not reflect the reality of the relationship (e.g. despite the wording of a contract, the actual reality is that the individual is in not in business on their own account and they work under the supervision and direction of the hirer) or are an avoidance tactic, then individuals are likely to fall into scope of the Regulations.

For further information about employment status and the application of the tests refer to Directgov [Understanding your employment status](#), in particular, the descriptions of agency workers, personal service consultants and independent contractors or consultants. The descriptions outline some of the factors that help determine employment status and include example situations.

**Ultimately, in the event of a dispute, it will be for the Employment Tribunal to decide the reality of the relationships between the parties involved and may, for instance, look at whether the type of arrangements in place are common for the type of worker involved.**

### **Placing a worker in a direct or permanent employment**

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.

Some recruitment agencies offer both temporary and permanent vacancies. A work-seeker's relationship with the recruiter depends on what type of work that they want to do. These Regulations only apply when supplying temporary agency workers to hirers (i.e. where they are acting as TWAs). TWAs should ensure that they make clear the way in which they are acting on behalf of the individual worker, as required in the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#).

### **Managed Service Contracts**

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.

The Managed Service Contractor must be genuinely engaged in supervising and directing 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.

Merely having an on-site presence (e.g. 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, for example health and safety responsibilities, this would not in itself mean that this was not a Managed Service Contract.

Please note that where a Managed Service Contractor requests agency workers via a TWA to work under their supervision and direction, they will be in scope as the Managed Service Contractor will be the hirer.

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

In-house temporary staffing banks are used as a source of internal flexibility. In practice, whether or not a particular arrangement falls in scope will depend on the reality of the employment and organisational arrangements. They are unlikely to be in scope where a company employs its temporary workers directly and they are only supplied to work for that same business – so they would not be acting as a TWA. Regulations governing directly recruited fixed term employees – [Fixed term employees \(prevention of less favourable treatment\) regulations](#) – have been in place since 2002.

If the in-house bank supplies workers to third parties, including associated companies, the in-house bank would be acting as a TWA for the purposes of the Regulations and an employment agency or employment business for the purposes of the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#).

## Illustrative examples

### Example characteristics that demonstrates and individual is in scope

- ✓ A company has a staff canteen managed by an in-house catering manager. One of the company's catering staff is absent and is replaced by a worker supplied by a TWA. During her assignment the worker is supervised and directed by the hirer's catering manager. She fits the definition of an agency worker and is in scope.
- ✓ A number of factory workers are sent by a TWA to work on a hirer's production line. Because there are lots of workers on the line provided by the same TWA, the TWA 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 the agency workers. However, each worker still does his or her job under the supervision and direction of the hirer. The workers all fit the definition of an agency worker and are in scope.
- ✓ Where one legal entity employs temporary workers and places them into another legal entity (e.g. 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 a TWA and the workers in scope.

### Example characteristics that demonstrate you are not in 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 a TWA as it does not fulfil all the requirements of a TWA given 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. The individual is not in scope.
- ✓ Where a single legal entity recruits temporary staff directly who work for the same legal entity they not in scope. The temporary staff are not agency workers and the hiring company is not a TWA
- ✓ An individual has set up his own limited company through which he provides IT services. He has a contract with a TWA 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 the services; he can also send a substitute to perform the services at any time or payment is made on specific deliverable or on a fixed price and not simply on an hour, 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 or customer of the individual, therefore the individual is out of scope. 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

## In summary

| In scope   | Out of scope   |
|--|--|
| <b>TWAs</b> – including intermediaries – involved in supply of agency worker   | Genuinely <b>in business on own account</b> working for clients or customers (business to business relationship)   |
| <b>Hirer</b> (end-user) supervising and directing agency worker  | <b>In-house temporary staffing banks, secondments</b>  |
| <b>Agency worker</b> (in tripartite relationship including those working through umbrella companies or other intermediaries) | <b>Managed Service Contract</b> staff who work under the supervision and direction of the company who employs or engages them – not under supervision and direction of company where they work |

# Qualifying for 'equal treatment'

Regulations 5-13

## At a glance

This section covers the entitlements that agency workers will receive from the first day of an assignment; entitlements in relation to basic working and employment conditions following a 12 week qualifying period and the timing of the receipt of the entitlements.

Don't forget that agency workers are already entitled to a range of statutory protections under the Working Time Regulations; National Minimum Wage etc; [Agency worker employment rights](#)

## Rights under these Regulations:

### Day 1 rights for all agency workers

Regulations 12-13

The Regulations give agency workers the same access to certain facilities provided by the hirer and information on job vacancies. The test relates to what comparable workers and employees receive and the agency worker is entitled from the first day of their assignment (so not after 12 weeks).

- Access to facilities
- Access to information relating to vacancies

### Access to collective facilities and amenities:

Regulation 12

**From day one of an assignment**, agency workers are entitled to be treated no less favourably than a comparable worker or employee<sup>1</sup> in relation to access to collective facilities and amenities provided by the hirer.

This is not intended to extend to all benefits which a hirer might provide to directly recruited workers or employees; rather, 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 up and drop offs, transport between sites – but not company car allowances or season ticket loans)
- toilets/shower facilities
- staff common room
- waiting room
- mother and baby room
- prayer room

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<sup>1</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 customer (see to Directgov [Understanding your employment status which contains pen pictures and profiles of workers and employees](#)

- food and drinks machines
- car parking

This is a non-exhaustive list and acts as an indication of which kind of facilities should be included. It applies to facilities provided by the hirer and therefore these facilities will usually be on-site. However, for example, if a canteen is used on another site – or shared with another company – then this should also be available to agency workers.

### **Access to facilities is not:**

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 and would not be given an automatic right to have a crèche place.

Nor is it about access to off-site facilities and amenities which are not provided by the hirer, such as subsidised access to an off-site gym as part of a benefit package to reward long term service or loyalty or to other types of benefits such as the ability to purchase discounted company goods in a staff shop or subsidised meals in a canteen.. However, this does not prevent hirers offering these to agency workers if they choose to do so.

### **Objective Justification**

This is the only element of these Regulations where there can be “objective justification” for less favourable treatment. Essentially, hirers have to ask themselves “is there a good reason for treating the agency worker less favourably?” 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. Even if there is objective justification, hirers may want to consider whether it is possible or 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**

An agency worker’s right is to treatment in relation to relevant facilities that is no less favourable than that given to an actual comparable worker<sup>2</sup> – an employee or worker directly employed by the hirer.

First, the hirer should establish if there are any comparable workers or employees. To be comparable they should be;

- doing the same or broadly similar work to the agency worker
- working at the same location as the agency worker or, if there is no such person, be in another location owned by the hirer (this is to avoid any confusion when a company has several different locations and may

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<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 customer (see to Directgov [Understanding your employment status which contains pen pictures and profiles of workers and employees](#))

have, for example, a canteen in one particular location to which all direct employees in all the locations have access).

If there are no comparable workers or employees there is no entitlement to equal treatment.

## **Access to information on job vacancies**

### **Regulation 13**

**From day one of an assignment**, all agency workers will be entitled to be provided with information about any relevant job vacancies within the hirer that would be available to a comparable employee or worker.

Hirers can choose how to publicise vacancies, whether it is via the internet/intranet or on a notice board in a communal area. But the agency worker should know where and how to access this information.

### **Access to vacancies is not:**

This obligation does not constrain hirers' freedom regarding;

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

This right will not apply in the context of a genuine 'headcount freeze' where posts are ring fenced for redeployment purposes or internal moves which are a matter of restructuring and redeploying existing internal staff in order to prevent a redundancy situation.

### **Access to vacancies comparator**

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 who may be geographically remote or on the basis of comparison with a predecessor.

## **In summary**

### **Day 1 entitlements – liability**

The hirer is responsible for providing equal treatment for day 1 entitlements and is liable for any breach of this obligation given the TWA has no control over providing an agency worker with access to facilities when they are on an assignment.

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, for example as part of an induction pack, or provide information to TWAs to pass to agency workers as part of the information about the assignment.

## Summary of Day 1 rights

| Comparator for Day 1 Rights   | access to facilities | access to vacancies |
|---|----------------------|---------------------|
| Employee or worker  | Yes                  | Yes                 |
| Working for and under the supervision and direction of the hirer            | Yes                  | Yes                 |
| Engaged in same or broadly similar work                                     | Yes                  | Yes                 |
| Based at same establishment   | Yes                  | Yes                 |
| Based at different establishment  | Yes                  | No                  |
| Must still be employed/engaged at the time of the breach of the Regulations | Yes                  | Yes                 |

## After 12 weeks in the same job

### Regulation 6

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. They are;

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

In addition, pregnant agency workers who have completed the 12 week qualifying period, will be entitled to **paid time off for ante natal appointments**

For any entitlement requiring a period of service – eg enhanced entitlement to annual leave after 12 months – the period starts at the time the qualifying period commenced (not 12 months and 12 weeks but 12 months).

## Calculating the 12 week qualifying period

### Regulation 7

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 does on a weekly basis.

Therefore, 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 done up to and including the following Monday will count as one calendar week.

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

The qualifying period is **not retrospective**; an agency worker will only start to accrue the 12 weeks qualifying period after the Regulations come into force on 1 October 2011 even if the assignment started before 1 October 2011.

An agency worker can qualify for equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one TWA over the course of that period of time.

This means that even if the agency worker has just joined a particular TWA, he or she may already have completed the qualifying period in relation to a particular role with a hirer, or at least have accrued a number of weeks towards completing it. In order to ensure that the agency worker receives their correct entitlement, the TWA will normally want to ask the agency worker for their up to date work history - the aim being to ensure that they have the correct information. This is already common practice for TWAs, who would of course be well-advised to ask for this information, since not to do so could leave that TWA in a position where it may be liable, in whole or part, for any lack of equal treatment.

### **Information on previous assignments**

While there is no legal obligation on the agency worker to provide information on previous assignments, if an agency worker fails to inform the TWA when asked if they have worked for a hirer before, and then brings a claim for equal treatment, the Tribunal may take this into account in making any award.

### **Anti avoidance provisions**

**Hirers and TWAs should also be aware of the anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the qualifying period (see section on anti avoidance measures to encourage compliance for more details).**

### **Working for multiple hirers**

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 6 weeks and is assigned by TWA 1 and is placed in the same hirer in the same job three weeks later by TWA 2 for a further 8 weeks. There has been no break of more than 6 weeks, the clock on the qualifying period pauses after 6 weeks and restarts when the agency worker returns to the same job.

### Working for multiple hirers

An agency worker has an assignment to drive an HGV1 lorry one day a week for 4 different hirers.

The agency worker will qualify for equal treatment in each of the separate hirers after 12 weeks subject to any breaks the agency worker takes during any of the assignments.

## The Qualifying Clock

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.

These provisions can best be explained by thinking of the qualifying period as a clock which runs from 0 to 12. Sometimes a gap between assignments – or a move to a new assignment - will mean that the clock is reset to 0 and must start again. In other circumstances a break will merely ‘pause’ 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.

### Reasons for the qualifying clock to 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 working in the same role are considered below
- If there is a **break between assignments with the same hirer of more than 6 weeks** (which is not one which ‘pauses’ the clock or during which it continues to ‘tick’)

### Types of break that will cause the qualifying clock to ‘pause’;

- A break for **any reason** where the break is **no more than six calendar weeks** and the agency worker returns to the same role with the same hirer

- 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 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 (for example at Christmas)
- A break caused by a **strike, lock out or other industrial action** at the hirer's establishment

### Breaks where the clock continues to tick

- Breaks due to **pregnancy, childbirth or maternity** which take place during pregnancy and up to 26 weeks after childbirth.
- Any breaks due to the worker taking **maternity leave, adoption leave or paternity leave**.

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 longer).

### Illustrative examples

#### Workplace closure

Where an agency worker works in a factory and has an assignment which starts for 2 weeks before it closes during the summer period and continues when it re-opens 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 re-opens. 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, 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 pauses after 5 weeks.

#### In summary

| Type of absence that affects the 12 week qualifying period  | Effect on 12 week qualifying period |
|---|-------------------------------------|
| Agency worker begins a new assignment with a new hirer  | Clock resets to zero                |
| 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 (which is not one which 'pauses' the clock or during which it continues to tick) | Clock resets to zero                |
| Any reason where the break is less than 6   | Pauses the clock                    |

|  |                                     |
|--|-------------------------------------|
| weeks  |                                     |
| Sickness absence                                   | Pauses the clock for up to 28 weeks |
| Annual leave                                       | Pauses the clock                    |
| Shut downs – e.g. 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 *               |
| Statutory maternity, paternity or adoption leave   | Clock keeps ticking **              |

\* 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)

\*\*Where an agency worker has a contract of employment with an agency and is entitled to this type of leave

## Definition of 'new' hirer

The qualifying clock will be reset to zero if the agency worker stops working for one hirer and begins working for another.

Generally such situations will be clear. 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 a substantively different role – see section on factors which indicate role is substantively different)

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. **TWAs should check this point with hirers.**

However, hirers and TWAs should be aware of the anti-avoidance provisions which prevent a series of assignments from being structured in such a way as to prevent the worker from completing the qualifying period. These provisions would cover, for example, the situation 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 deprive the agency worker from receiving equal treatment.

## Illustrative examples

An agency worker acting as a Supply Teacher moves from one assignment to a separate assignment with another school without any break (or the break is no more than 6 weeks). The agency worker has not worked for either school since the introduction of the Regulations so there are no previous assignments to consider. If the second school has a separate legal identity then the qualifying period starts again as it is with a new hirer. If both schools are part of the same legal entity then the qualifying period continues.

An NHS 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 an 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 different government departments as a PA. The qualifying period would continue to tick if the agency worker moved 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.

## Substantively different

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

**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 or 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 has to be a genuine and real difference to the role.

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

In the event of a dispute, a combination of factors can be expected to be taken into account by a Tribunal when establishing whether or not the work or duties are 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?
- ✓ Is the pay rate different?
- ✓ Is the work in a different location/cost centre?
- ✓ Is the line manager different?
- ✓ Are the working hours different?
- ✓ The role requires extra training - and/or a specific qualification that wasn't needed before?
- ✓ 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.

In order for the 12 week qualifying clock to be reset to zero, the hirer must notify the agency that the work or duties have changed and this information must be passed to the agency worker:

- A hirer must notify a TWA in writing when there is a new role that is substantively different (see [Conduct Regulations](#) for more details) and record details of on the job requirements.
- The TWA must provide a description of the new role in writing to the agency worker. The TWA 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**

A hirer can obviously decide not to engage agency workers beyond the 12 week qualifying period. There is nothing in the Regulations to prevent an agency worker being released after say 11 weeks or for assignments of 12 weeks to be the usual practice of any hirer. However, hirers and TWAs 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 entitlements.

For example, an agency worker completes 2 or more assignments with the same hirer, where they have already worked for 12 weeks with a 6 week break and then a further 12 weeks with 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 the Tribunal in the event of a claim.

## **How to identify ‘basic working and employment: Conditions’ and the relevance of a “comparator”**

### **Regulation 5**

#### **At a glance**

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 to receive them.

It also examines when a “comparator” is appropriate and how one is identified.

#### **How equal treatment is established**

Deciding what “equal treatment” means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job.

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. They are those which are ordinarily included in relevant contracts (or associated documents such as pay scales, collective agreements) of direct recruits. This means terms and conditions normally set out in:

- (a) Standard contracts;
- (b) A pay scale or pay structure;
- (c) A relevant collective agreement;
- (d) A company handbook or similar

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

In most cases equal treatment can be simply established by giving the same relevant entitlements "**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 would be entitled to, given a particular role and his/her particular skills and qualifications.

## **Comparator**

**It is not necessary to look for a comparator.** Given what is said above, it is quite possible to identify the appropriate "basic working and employment conditions" without one.

However, the hirer will be deemed to have complied with the Regulations on 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>3</sup>.

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. They must work at the same 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.

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<sup>3</sup> An employee has a contract of employment

## Illustrative examples

### **Where a hirer has pay scales or pay structures**

A hirer has various pay scales to cover its permanent workforce, including its 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 pay scale. Is this equal treatment?

Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then that is the entitlement.

Starter grades which apply primarily, or exclusively, to agency workers may not be compliant if not applied generally to direct recruits.

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

A hirer has decided to increase its 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 £8-10 per hour– those recruited most recently being paid £8 per hour, the higher rate reflecting on the job experience. The work involves no specialist skills and only minimal on-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 pay scales or structures or 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 pay scales 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 pay scales or collective agreements, or a 'going rate', so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However if, say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public 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 10-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 – which the hirer and agency would need to be very clear was the case. But, 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, the pay they receive should be the same as if they had been recruited directly – or paid to a comparator if appropriate. Where an umbrella 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 a day but this can be made up of £80 plus £20 reimbursement of travel expenses.

# Pay

## At a glance

Having completed the 12 week qualifying period, the agency worker is entitled to the same basic terms and conditions that he or 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 guide explains what is included and excluded in the definition of 'pay'.

## '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 any requirements regarding the number of qualifying hours
- shift/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
- bonus 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 quality of personal performance (see sections below 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.
- vouchers or stamps which have monetary value and are not "salary sacrifice schemes" – e.g. luncheon vouchers, child care vouchers

## '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 from October 2012 – see website for more details [www.dwp.gov.uk/policy/pensions-reform](http://www.dwp.gov.uk/policy/pensions-reform))
- 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 e.g. for season tickets
- expenses such as accommodation and travel expenses
- payments or rewards linked to financial participation schemes such as share ownership schemes, phantom share schemes
- overtime or similar payments where the agency worker has not fulfilled 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 in stamps which have a monetary value and are included on previous page), given as an incentive or reward for long-service, for example, where Building Society staff may be given a reduced rate mortgage, employer funded training allowances
- any payments that require an eligibility period of employment/service, if not met by the agency worker (same treatment as if directly recruited) or if the agency worker is no longer on assignment when the bonus is paid (if the same applies to those directly recruited i.e. no longer working for the hirer)
- bonuses which are not directly linked to the contribution of the individual – e.g. a flat rate bonus that is given to all direct recruits to encourage loyalty or long term service
- additional discretionary, non-contractual bonuses, as long as these payments are not made with such regularity that they have become custom and practice – see section above on bonuses and commission payments

### **Bonuses linked to individual performance**

There are many different types of bonus or commission payments. The key question is whether the bonus or incentive payment or reward is directly attributable to the amount and quality of work done by the agency worker. If it is for another reason other than the amount or 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 entitlement to the same terms and conditions relating to pay.

### **Examples of bonus payments that would be included;**

- commission payments linked to sales;

- bonuses payable to directly recruited staff who meet a specific individual performance target, e.g. in terms of calls handled in a given time;
- bonuses payable on the basis of individual performance over a given period, e.g. a reporting year

### **Examples of bonus payments which would be excluded;**

Bonuses which are determined by the overall performance of the company and given to workers who have been with the hirer for a number of years (and are not based on their individual performance)

- 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
- bonuses designed to reward loyalty and service to the organisation and not based on individual performance

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.

Where a bonus payment to a direct recruit would reflect performance and time served (so 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 an agency workers.

### **Performance appraisal systems**

The Regulations do not require integration of agency workers into performance appraisal systems for someone directly recruited. It may be easier in some circumstances to fully integrate the agency worker but it is not a requirement.

The agency worker is entitled to the bonus that he or she would have been entitled to if hired direct to do the same job, but this does not mean that the same process for assessing performance need be followed.

For example, annual appraisals can cover long term career development and it would be appropriate for the hirer to modify the assessment process and to conduct shorter appraisals for agency workers.

Conducting an appraisal of an agency worker's performance in the role, in order to determine this aspect of "pay", should not of itself affect the worker's employment status.

It may however be considered inappropriate to fully integrate the agency worker into the hirer's appraisal system. 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
- utilising an agency's existing appraisal/feedback system to keep track of their performance through regular discussion between the hirer and agency – this could be utilised to decide if an agency worker should get a “standard” bonus or one linked to high achievement

### **Illustrative examples**

#### **Where an individual performance bonus is in 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
- 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 workers 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 for all employees of 12 months before receiving a bonus. The agency worker will be entitled to the same treatment after 12 months.

The 12 months eligibility period is counted from the start of the assignment so the agency worker does not have to work 12 months plus 12 weeks before they receive an entitlement a directly recruited employee would have received after 12 months.

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

In many instances a bonus scheme is based initially on company performance or performance of specific business unit 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 so linked to the amount or quality of work done by a worker. If it is possible to identify a part of the award linked solely to company performance – which should be out of 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.

## Annual pay award

Where a hirer gives an annual pay increment, an agency worker should receive the pay increment that he or she would have been entitled to if recruited directly to do the same job, therefore the TWA and hirer need to keep in touch to ensure that agency workers receive correct pay entitlements.

### In summary

| What is included in "pay"  | What this means  | Does not mean  |
|--|--|--|
| <b>Basic Pay</b>   | 'Pay for work done'; annual salary usually converted in hourly/daily rate.<br><br>NB to this may be added some or all of the other contractual elements below and includes shift / unsocial hours / pay and risk payments for hazardous duties | Occupational pension contributions;<br>redundancy/severance, expenses; occupational sick pay<br>occupational maternity, paternity, adoption pay<br><br>Note: agency workers are entitled to statutory sick pay (paid by TWA) |
| <b>Overtime pay</b>  | 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)  |
| <b>Bonus or incentive payment linked to personal performance</b> | '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  |
| <b>Holiday pay</b>   | Above the statutory minimum, can be given as leave or paid in lieu as part of the hourly/daily rate or at end of assignment  | Other contractual and statutory paid leave, (e.g. compassionate leave, paid time off for union duties or jury service) NB unless employed by the TWA, who would be responsible for any such provision due                    |
| <b>Vouchers or stamps</b>  | Of fixed monetary value so another form of "pay", such as luncheon vouchers  | Other benefits in kind, Financial Participation Schemes, Phantom Share Schemes   |
| <b>Paid time off for antenatal appointments</b>                  | After the 12 week qualifying period, paid at full hourly rate for the time it takes to attend the appointment  |  |

# Working time and holiday entitlements

## At a glance

This section covers what is included in working time and holiday entitlements. In addition to existing rights ([Working Time Regulations 1998](#)), 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 he or she would have received as a direct employee.

## Working time entitlements – duration of working time; night work; rest periods and breaks

Many hirers may already offer some or all of these entitlements to agency workers from day one of an assignment.

For example, where a someone directly recruited would have had a more generous entitlement to rest than the statutory minimum requirement (perhaps a lunch hour rather than the minimum 20-minute rest during a shift of more than six hours), an agency worker working the same shift will also be entitled to this once the 12-week qualifying period has elapsed.

Duration of working time this 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.

## Paid Holiday leave

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 and public holidays.

As with rest breaks, if a hirer would have given a more generous contractual leave entitlement to the agency worker if recruited directly to fill the same job, the agency worker concerned should receive the same enhanced entitlement once the 12-week qualifying period has elapsed.

## Payment in lieu option

There will be many differing entitlements to paid holiday leave provided by hirers and a possible way of simplifying the administration of this entitlement 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 as part of the hourly/daily rate. Such arrangements would only relate to additional, contractual leave which is in excess of the statutory minimum.

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.

# Pregnant workers and new mothers

## At a glance

After completing a 12 week qualifying period in a given job, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment.

If they can no longer complete the duties of the original assignment for health and safety reasons, they will also need to be found alternative sources of work (paid at a rate that is no less favourable than the last assignment which was terminated on health and safety grounds related to the pregnancy).

If 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.

This provision does not give the agency worker any additional entitlement to maternity, paternity or adoption rights beyond those to which they would otherwise have been entitled.

## Existing provisions

The intention of these provisions is to protect agency workers who are pregnant or who are new mothers, with the aim of keeping them in the workplace and to ensure women are not treated unfairly because of their pregnancy. This is in addition to existing discrimination protections in the Equality Act 2010. The Equality Act provides that that less favourable treatment on grounds of pregnancy or maternity is discrimination.

This would mean, for example, it would be discrimination if agency refused to place a worker, or if a hirer refused to accept a worker because she was pregnant. Similarly, it would be discrimination if a placement were terminated because of pregnancy or if the worker was subject to a detriment because of her pregnancy. An employment agency needs to ensure that it doesn't discriminate when offering/providing its services. For example, it may be indirect discrimination if an agency refused to accept a woman onto its books because she only wanted to accept part-time work or 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.

This guidance applies to pregnant women, women who have given birth in the last 6 months or women who are breastfeeding.

## **For further information**

[Directgov – working when pregnant](#)

[Business Link – pregnancy at work](#)

[Health and Safety Executive - Health and safety for new and expectant mothers](#)

## **Responsibility of the pregnant agency worker**

The agency worker will need to first notify the agency of her pregnancy and also in writing to the hirer. The agency may wish approach the hirer on her behalf and to ask for a health and safety risk assessment in the current assignment.

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 alternative suitable work if available, where the agency worker be paid at the same rate until the end of the assignment. The agency worker will not be eligible to be paid if they have unreasonably refused suitable alternative work.

The agency worker should inform the agency of any ante-natal appointment so that she will continue to be paid at the usual hourly rate.

## **Responsibility of the TWA**

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.

If this is not possible, the agency will need to seek alternative suitable work with another hirer, paid at least at the same rate and 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.

## **Responsibility of the hirer**

When a risk assessment is required, it is the hirer's responsibility to carry one out and where a risk is identified, the hirer is obliged to make adjustments to remove the risk.

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.

## **Suitable alternative work**

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 they have agreed to undertake with the agency.

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 doesn't have a suitable alternative role available**

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.

## **Ante-natal appointments**

After a 12 week qualifying period in a particular job, a TWA 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 appointment.

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.

Antenatal care may include relaxation or parent craft classes as well as medical examinations, if these are recommended by the agency worker's doctor.

You will need to bear in mind that ante-natal clinics can be busy places and patients are not always seen on time and the payment covers the entire appointment including the time taken to and from the appointment if it's during assignment hours.

Directgov advice to individuals is to try to avoid taking time off work where you can reasonably arrange classes or examinations outside working hours.

## Pay between assignments

### At a glance

There is an **exemption from equal treatment provisions on pay (and holiday pay)** where a TWA 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.

The TWA should explain this to the agency worker so they can make an informed decision as to whether they are willing to agree to forgo this entitlement 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 entitlement to equal pay as set out in the regulations.

The rate of pay between assignments must be at least 50% of on assignment pay, at least 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.

### New entitlements

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 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 TWA and the agency worker).

Additionally they must receive day 1 entitlements as these rights apply regardless of these agency workers being on a pay between assignments contract. The exemption only covers pay.

### Permanent contract of employment

To qualify for this exemption, the agency worker must be given a [permanent contract of employment](#) with the TWA 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 under the contract has begun.

These contracts must comply with the requirements in 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 (e.g. an agency worker may only be available for 2 days per week so a 5 day assignment would not be 'reasonable')
- nature of work
- a statement that makes clear that the agency worker is foregoing entitlements to equal treatment in so far as they relate to pay

Additionally the pay between assignments must be at least 50% of assignment pay based on previous 12 weeks and not below the [National Minimum Wage \(NMW\)](#). It applies to the calendar weeks in 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**

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 provides that any week during which an agency worker works during an assignment covered by the derogation contract counts as a full calendar week e.g. 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.

Payment between assignments must be at least 4 weeks of 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**

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.

The pay between assignments derogation is designed to be used where an agency worker has a contract of employment with a TWA 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. TWAs 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 risk of a legal challenge.

## **Illustrative examples**

If a TWA were to pay the agency worker for a short period (which might be as little as one hour) when there is in reality no assignment available, a worker could argue that he or she is 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 a TWA offers differ from the expected hours of work included in the contract, this could likewise result in a challenge.

If there is no permanent contract of employment between the TWA and 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 TWA (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

## **Rate of pay between assignments**

The agency worker will need to receive at least 4 weeks of pay between assignments (at the 50% rate or at least NMW) before the contract can be 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 a right to equal treatment on pay.

## **A suitable offer of work**

From the outset, and before the first assignment, the TWA and 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 TWA, the agency worker may not be available for work and therefore not entitled to receive pay between assignments.

## **Ending a pay between assignments contract**

If the TWA wants to terminate the contract it must first satisfy the requirement for the TWA to give 4 weeks pay to the agency worker. The 4 weeks pay must be paid before the TWA can terminate the contract. The contract can end earlier other than by termination by the TWA eg if the agency worker resigns<sup>4</sup>.

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 the year the agency worker has been paid between assignments for at least 4 weeks, at the end of

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<sup>4</sup> If agency worker resigns no payment is required as agency worker rather than TWA has terminated contract

the contract no further payment under these regulations is required. Other contractual obligations e.g. notice pay, may apply which are outside of these Regulations.

## **Pregnant workers working on a pay between assignments contract**

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

Once these provisions no longer apply - i.e. they wouldn't otherwise be performing the original assignment - from that point the pay would be determined by the pay between assignments contract.

### **Illustrative examples**

**An agency worker 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 TWA 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 TWA cannot find work for an agency worker**

An agency worker works for a hirer for 4 weeks at £10.00 per hour for 40 hours. The TWA cannot find the agency worker a suitable job the next week so the agency worker is entitled to at least 50% of rate of pay as long as it is at least the NMW. Therefore the agency worker is entitled to 40 hours x NMW and will be paid until the TWA 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)

# Information requests, liability and remedies

## At a glance

This section covers:

- the information required by a TWA before placing an agency worker on assignment
- when a TWA should ask the hirer for information about basic working and employment conditions following 12 weeks in a given job
- compliance information required by a TWA 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
- how a claim to an Employment Tribunal is dealt with given multiple parties are involved and penalties that a Tribunal might award

It is preferable for disputes to be solved in the workplace at the earliest opportunity, minimising costs, stress and time involved for all parties. Acas can get involved in pre claim and post claim conciliation.

### **Information a TWA must have before supplying an agency worker**

For each vacancy a TWA (“the agency”) receives from a hirer, they must record details about the vacancy including the details as set out in separate, pre-existing legislation, the [Conduct Regulations](#), before they introduce or supply an agency worker to that hirer. The [Gangmasters licensing](#) regulations apply in the food and agricultural and shellfish sectors.

### **When a TWA should ask a hirer for information about basic working and employment conditions**

It may be clear at the start of an assignment that it will last for more than 12 weeks and it may be good practice for the TWA to ask for information at an early stage – or even in advance of the assignment starting.

But this is a matter between the TWA and hirer and no timescale has been deliberately set out in the Regulations to give flexibility.

In some instances the assignment may be scheduled to last for less than 12 weeks but is extended. In this situation, the TWA 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 TWAs involved in the supply of the agency worker, the TWA who has the direct contractual relationship with the hirer should undertake this action

## Compliance information required by a TWA from a hirer

A TWA cannot supply an agency worker to a hirer without certain information due to existing legislation (refer to [Conduct Regulations for more details](#));

- the identity of the hirer, nature of business and location
- start date and duration of assignment
- job role, responsibilities and hours
- the experience, training, 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
- any expenses payable by or to the work-seeker

In addition, a hirer will need to provide the TWA with the following details in order to comply with these Regulations (usually found in standard terms and conditions or a company handbook), if and when an agency worker completes 12 weeks in a given job. As the entitlement 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.

- 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 and information on annual pay increments)
- if they offer **vouchers** which have monetary value
- **annual leave entitlement**

While day 1 entitlements are the responsibility of the hirer, it may be useful for the TWA to enquire about the facilities on their premises and how they provide information on their job vacancies. But this is a matter for the TWA and hirer to agree.

### Working through multiple TWAs

It is essential that correct hirer information is supplied from one TWA 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 TWAs under the Regulations). In the event of a claim, the Tribunal would decide which party was responsible for any breach to the extent that it is responsible for the infringement.

## Process for an agency worker to obtain information

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

- 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 direct to the agency which in turn passes it to the agency worker in advance of the assignment starting or the hirer might issue information as part of the induction of agency workers but that is a matter for the hirer and TWA)
- if it is about entitlements **after the 12 weeks qualifying period** then the requirement to provide information lies with the TWA and the agency worker can only request information after the 12 weeks have elapsed.

Agency workers should be encouraged to talk to the TWA in the first instance as the TWA will often be able to resolve difficulties without resorting to formal procedures or to liaise with the hirer to ensure the agency worker receives the information. This informal approach is not required by the Regulations.

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 direct with a written request for information before making a claim. The hirer has 28 days to respond in writing from receipt of the request.

### The hirer should 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

For access to facilities, the hirer may have good reasons why the agency worker is treated differently which 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.

If the request is in relation to basic working and employment rights 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 TWA about any aspect of equal treatment they do not believe they were receiving before making a claim

**The TWA 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 e.g. 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, e.g. 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**

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 TWA has had the chance to respond before approaching the hirer.

**In summary**

| <b>Entitlement</b>  | <b>Who must provide written info</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                                | Day 1. The hirer has 28 days from receipt of the written request to respond in writing   |
| I do not consider I am receiving the correct holiday entitlement/rate of pay? | Agency in first instance; then hirer | Once the agency worker has qualifying for equal treatment. If a written response is not received from the agency within 30 days of making the request then the agency worker can write to the hirer who has 28 days from receipt to respond. |

## **If an agency worker is unsatisfied with the response or does not receive a response**

An agency worker can bring a claim an Employment Tribunal in relation to their rights in the Regulations. The Tribunal can draw an adverse inference from the fact that a written statement that was requested was not provided. The agency worker can bring a claim without a written request but should be encouraged to seek information before making a claim.

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).

To help resolve matters without the need for Tribunal intervention, [Acas](#) will be able to get involved in pre and post claim conciliation.

## **Liability and remedies**

### **Regulations 14, 17 and 18**

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

Liability rests with the hirer for failure to provide Day 1 entitlement. The TWA will not be held liable because they do not have a role in delivering these entitlements as the TWA has no influence or role in providing access, for example, to a company canteen.

For failure to provide basic working and employment conditions, liability can rest with either the TWA (or TWAs where more than one is involved in the supply of the agency worker) and/or the hirer to the extent that each is actually responsible for the failure. Even if the TWA 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 it can establish this defence then the hirer will become liable for that liability which would have been the TWAs.

The hirer will be liable for any breach to the extent that it is responsible for the infringement. So, if a hirer had failed to provide information to the TWA, or provided incorrect information, about basic working and employment conditions and the agency worker was not receiving appropriate treatment under the Regulations, then the liability could be the sole responsibility of the hirer.

It is therefore in the interests of all parties to exchange information in a timely manner. As a matter of good practice TWAs 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 TWAs when they amend their basic working and employment conditions eg pay and bonus reviews.

In a Tribunal claim, where the responsibility or a breach of Regulations is not clear, or has not been conceded, as between TWA and hirer, the agency worker may claim against both the TWA 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. a hirer or a TWA) 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:**

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/TWA takes certain action to remove the adverse effect on the agency worker.

### **What an agency worker will receive**

The agency worker will be compensated for any loss of earnings related to their entitlements under the Regulations – or receive an appropriate level of compensation, for example if they have been denied access to a facility. There is no maximum award but there is a minimum award of two weeks of pay 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.

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 that they have been engaged there previously, they should inform the agency straight away.

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**

The Regulations contain an “anti avoidance” provision designed to prevent structures of assignments that are put in place to intentionally circumvent the Regulations.

In all circumstances, 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, in order for the anti-avoidance provisions to become relevant.

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
- the length of break periods

It would still ultimately be for a Tribunal to decide whether the pattern of assignments indicated an intention to deprive the worker of his or her rights, weighing evidence from the 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 Employment 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 weeks qualifying period or will retain the entitlement to equal treatment.

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

# Other factors

## At a glance

This section covers other factors that are affected by the Agency Workers Regulations;

- thresholds for bodies representing agency workers; from 1 October 2011 temporary agency workers will count towards the thresholds in Temporary Work 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 TWA
- information of 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

## Thresholds for bodies representing agency workers

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 an organisation must employ before they come into effect.

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.

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 the UK this will apply to the TWA where the worker is registered and not to the hirer.

If a temporary agency worker has a relationship with two or more agencies the agency worker could potentially count towards the threshold of each one, because they may have ongoing relations with each. However, if a person 'on the books' of the temporary work 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

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 and Health and Safety representative bodies.

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, therefore cannot be counted towards such a threshold.

If you are a temporary work 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.

**Information on the establishment of representative bodies can be found at:** <http://www.acas.org.uk/index.aspx?articleid=2391>

## **Information of workers' representatives**

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 collective bargaining, Joint Consultative Committees and European Works Councils. It also covers issue-specific situations including collective redundancies and Transfer of Undertakings (TUPE) situations.

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.

### **Information must include:**

- the total number of agency workers engaged
- the areas of the business in which they are utilised
- the type of work they are contracted to undertake

The definition of information to be provided does not include information on agency workers' terms and conditions.

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 Safety Representative and Safety Committee Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996.

As a hirer you will need to put processes in place to manage the additional administrative procedures that this requires. You will also 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;

TUPE

<http://www.berr.gov.uk/files/file20761.pdf>

Collective bargaining

<http://www.acas.org.uk/CHttpHandler.ashx?id=273&p=0>

Collective redundancies

<http://www.acas.org.uk/CHttpHandler.ashx?id=877&p=0>

European works Councils

<http://bis.gov.uk/policies/employment-matters/rights/info-con/ewc>

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 5000

If you require this publication in an alternative format, email [enquiries@bis.gsi.gov.uk](mailto:enquiries@bis.gsi.gov.uk), or call 020 7215 5000.

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