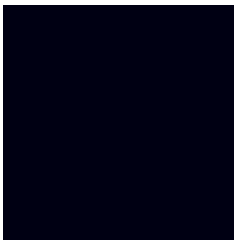




Orgtel in association with DLA Piper presents:
Everything you need to know about the
Agency Workers Regulations



A guide for employers

Our guides

This guide is part of Orgtel's dedication to supporting our customers and delivering market-leading recruitment solutions. As one of the world's leading recruitment consultancies we pride ourselves on being a key recruitment partner for professionals and organisations across a range of sectors.

Our series of guides offer best practice advice and an insight into the latest recruitment news, whether you are looking to secure your next job or make your next hire.

About Orgtel

Orgtel is a specialist provider of recruitment solutions to the Investment Banking, Financial Markets, Finance and IT sectors. Working with some of the world's leading organisations and with offices across the UK and Europe, Orgtel excels at delivering exceptional recruitment solutions regardless of the size and scope of your project.

As specialists within their field our consultants pride themselves on providing high levels of service; delivering effective recruitment solutions and nurturing successful and rewarding careers. It's this dedication that has helped us gain our prestigious reputation and which has allowed us to become a key partner to companies and professionals within the banking sector.

To find out how we can help you manage your next recruitment challenge visit: www.orgtel.com

Introduction

The Frequently Asked Questions (FAQs) below relate to the Agency Workers Regulations 2010 (AWR), new UK legislation which comes into force from 1 October 2011. The aim of the AWR is to protect temporary agency workers by ensuring through legislation that they have a right to equal treatment in basic working and employment conditions, as if they were employed on a permanent basis after 12 weeks service in the same job. From the 1 October agency workers will also be entitled to access certain client facilities and information on client job vacancies from day one of their assignment. The AWR does not change the employment status of agency workers.

Please refer to the FAQs below, which have been compiled to help our clients understand the scope and application of the AWR. Please note the AWR adopts the term “agency worker” throughout, so the same terminology is used in these FAQs together with the “hirer” to mean the hiring company or end-user.



“The AWR is now firmly on end users’ radars and there is a growing thirst for information...”

Ann Swain, Chief Executive APSCo



Please use the following links to navigate around the FAQs:

- [AWR overview \(Q1\)](#)
- [Who is an agency worker? \(Q2-Q3\)](#)
- [Limited company contractors \(Q4-Q6\)](#)
- [Equal treatment rights \(Q7- Q11\)](#)
- [Calculating the qualifying period \(Q12-Q14\)](#)
- [Umbrella companies \(Q15-16\)](#)
- [Remedies \(Q17\)](#)
- [Further information \(Q19\)](#)

FAQs

Q1. What do the Regulations say and when will they come into effect?

A. The AWR comes into effect for the UK on 1 October 2011.

Day one rights

The day one rights give agency workers the same access to certain facilities provided by the hirer and information on job vacancies as the hirer's comparable permanent workers from the first day of an assignment.

An agency worker has the right to be treated no less favourably than a comparable employee doing the same or similar job in the hirer's establishment in relation to information about vacancies.

An agency worker also has the right to be treated no less favourably in relation to collective facilities and amenities, such as a canteen or other similar facilities, access to childcare facilities and the use of transport services. However, hirers can justify less favourable treatment on objective grounds, for example if the hirer is seeking to achieve a genuine business objective and the treatment is a necessary and appropriate way of achieving that objective. Cost may be one factor taken into account but practical and organisational factors will also be considered.

The hirer is responsible for providing equal treatment for day one rights.

After 12 weeks - right to equal treatment

After 12 weeks in the same job the AWR entitles agency workers to receive the same basic employment and working conditions as permanent employees. The 12 week qualification period applies even if the worker

has been supplied by two different agencies over that 12 week period.

Q2. Who is an agency worker?

A. An "agency worker" is defined as an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer. They have a contract of employment or contract to perform work and services personally with the temporary work agency.

Q3. Who is not an agency worker?

A. The definition of an "agency worker" will exclude the genuinely self-employed and those working through their own service company, but not individuals with their own personal service companies who are not in business on their own account.

The Regulations are unlikely to apply to individuals working for in-house temporary staffing banks where a company employs its temporary workers directly, and they only work for that business. However, if you run a company specifically to supply "agency workers" then they will be within scope. The guidance suggests that the Regulations will not apply to workers seconded from one organisation to another but this may depend on the particular circumstances. In practice, whether or not an arrangement falls within scope of the Regulations will depend on the employment and organisational arrangements.

Q4. What does the AWR say about workers supplied by master or neutral vendors?

A. Master or neutral vendors may assist you in managing your contract portfolio. Placements routed via a master or neutral vendor will be within scope unless an exception applies, for example "genuinely

self-employed contractor". The "Swedish derogation" exempts them from pay provisions but not day one rights.

Q5. Does AWR apply to workers supplied pursuant to Managed Serviced contracts where the service provider provides a total service such as a cleaning service and controls and supervises the workforce itself?

A. The AWR states that genuine managed service contracts are excluded.

Q6. Can an agency worker contract out of the AWR?

A. No, the AWR expressly prohibits agency workers from contracting out. The Regulations impose a fine of up to £5,000 on the agency or hirer where anti-avoidance arrangements have been put in place to prevent the 12 week qualifying period from being met.

Q7. How does Orgtel contract with its agency workers?

A. We often refer to "agency workers" as "contractors".

Orgtel does not run its own payroll. More than half of all our contractors provide their services through a limited company, usually their "personal service company" (PSC). Save for a very small minority the remainder supply their services through one of our preferred supplier management companies, commonly known as umbrella companies. Umbrella companies enter into an employment contract with agency workers in order to supply them to agencies. They offer compliant payrolls and take the stress out of contracting for many workers. These umbrella workers fall within the scope of AWR.

Q8. Will the AWR apply to our contractor agency workers?

A. The AWR does not apply to genuinely self-employed contractors (who genuinely operate in business of their own account), see Q3 above. Therefore, contractors that consider themselves “in business on their account” will fall outside the Regulations. All other temporary agency contractors are protected by the AWR.

If a contractor working through a PSC considers that they are genuinely self-employed during a placement we can collect written confirmation from them and treat them as outside the scope of AWR for that placement. This means that AWR provisions will not apply to the placement.

Q9. When will the AWR apply to our agency workers?

A. The AWR will apply to all your new placements after 1 October 2011. For your placements running as of 1 October 2011 it will apply after the 12 week qualification period, i.e., 24 December 2011. This means that all your placements will need to be compliant before 24 December 2011.

Q10. What type of “equal treatment” benefits are agency workers entitled to receive after 12 weeks service?

A. From the 1 October 2011 agency workers who have successfully completed 12 weeks service in the same job, will have a right to equal treatment in basic pay, overtime, bonus and commission related to individual productivity and the right to be paid and take the same holidays as a comparable permanent employee. Agency workers will also be entitled to receive luncheon vouchers and other vouchers with a monetary value (but not those provided through a salary

sacrifice scheme such as childcare vouchers). Agency workers will have the right to work the same hours as comparable permanent employees.

Q11. What benefits will agency workers not be entitled to?

A. Agency workers will not be entitled to equal treatment in relation to occupational pension schemes, share schemes, sick pay, redundancy pay, maternity/paternity rights (but they may be entitled to SMP/maternity allowance), bonuses related to the company’s performance, occupational sick pay (but they may be entitled to SSP), non-cash awards, advances in pay or loans, additional discretionary and non-contractual payments.

Q12. Will agency workers be entitled to time off for antenatal appointments?

A. After the 12 week qualifying period, a pregnant agency worker will be entitled to paid time off to attend antenatal appointments. Agency workers will not be entitled to equal treatment with regard to maternity pay but may be entitled to statutory maternity pay from the agency.

Q13. How do we fulfil the equal treatment requirement and how do we establish a comparator?

A. The right to equal treatment is a right to equal treatment measured against a comparable employee of the hirer (if there is one) doing broadly similar work within the same organisation. If an existing comparable employee receives treatment which is consistent with the basic working and employment conditions of the agency worker, then the equal treatment rule will be deemed to have been complied with. You can however, take into account the comparator and agency worker’s respective qualifications, experience and expertise. The treatment simply

has to equal how the hirer would have treated the agency worker if they had been recruited directly.

Useful preparation you can do now is consider the rules and processes around establishing the terms of a full time permanent role. In future, similar rules and processes will need to be applied to establish the terms of a contract placement. It will be time well spent over the next few months working or making these rules or processes as streamlined as possible and communicating with all members of your organisation who could be in a hirer position.

Q14. What is the definition of “pay” under the AWR?

A. The definition of pay includes: basic pay, overtime, and shift rates, bonuses directly attributable to the amount or quality of the work performed by the agency worker; commission payments and holiday pay.

Orgtel can assist you in rolling out a checklist to be completed for all potential agency roles. We are keen to work through this analysis with you right at the start of the process at what we call “job order” stage when you first notify us of the vacancy. We anticipate that in most placements we will wrap all these elements of pay into a standard hourly or daily rate; covering your AWR obligations whilst remaining simple for processing purposes.

Q15. How do we calculate the 12 week qualifying period?

A. The right to “equal treatment” will only be triggered when the agency worker has completed 12 continuous calendar weeks of service in the same role. A calendar week starts on the first day of the assignment.

Calendar weeks will accrue regardless

of how many hours the worker does on a weekly basis - one hour is enough.

The Orgtel preferred approach to any placement is to firstly determine whether a placement is in AWR scope. Once you have let us know who you wish to offer the role to we will ascertain whether they provide services through a PSC and whether they consider themselves to be genuinely self-employed. If not, then the contractor is in scope. We are keen to make the process easier for all parties and where possible will do our utmost to ensure the placement is AWR compliant from day one. This means no worries about the clock.

This is possible because most of our placements are at the higher end of the contracting market and there is a market premium attached to Orgtel's contractor's rates to reflect that they do not have the security of employment status, they are specialist and they are flexible. This approach may cause some additional compliance at setup but will be worth it given that most of our placements are set up initially over 12 weeks or certainly extend over 12 weeks. All parties will have maximum peace of mind.

Q16. Does the 12 week calendar period apply irrespective of whether the agency worker is supplied through different agencies?

A. Yes the clock continues to run. For example, an agency worker working with four different agencies who place him or her with the same hirer for just one day (say for one hour) each in a 12 week period, will be protected under AWR. A direct result of this is that hirer clients and agencies will be required to keep much better records of agency worker placements and also share that information between each other as a matter of best practice.

Q17. What events can stop, pause or reset the clock?

A. Continuity of service will be broken in the event of any break of six weeks or more during or between assignments in the same job with the same client or if the agency worker is no longer in the same role. In either case the twelve week qualifying period will be reset. The table shows what events can stop, pause or reset the clock:

Event	Effect on 12 week period
Agency worker begins a new assignment with new client	Clock resets to zero
Agency worker remains with same client but in a substantively different role	Clock resets to zero
Agency worker has a break of more than 6 weeks between similar assignments with same client	Clock resets to zero
Agency worker has a break of less than 6 weeks between similar assignments with same client	Pauses clock
Sick leave	Pauses clock for up to 28 weeks
Annual leave	Pauses clock
Pregnancy, maternity leave or absence	Clock keeps ticking

Q18. What are Orgtel's PSL companies doing to be AWR compliant by 1 October 2011?

A. Some were heavily involved in finalising the AWR and they are all actively making changes to their systems to ensure that they can make payments that will be compliant with the Regulations. It is critical to them that they receive accurate information down the chain from you.

Most umbrella companies on our preferred supplier lists are also looking at the Swedish derogation model. Please refer to question 19.

Q19. Will we be able to contract-out of the equal treatment requirement in relation to pay by adopting the Swedish Derogation model?

A. Agency contractors will fall outside of the scope of the AWR in relation to pay (and holiday pay) if they are given more comprehensive employment rights, the so called "Swedish Derogation" model. This is a permanent contract with the agency worker which complies with very specific conditions. The most important condition is that in between assignments the contractor must receive a level of pay of either 50% of the weekly assignment rate or the

national minimum wage whichever is higher. The weekly assignment rate is calculated at the highest pay rate and hours enjoyed over the previous 12 weeks (or the duration of the assignment if it lasted 12 weeks or less). The contract cannot be terminated without the agency worker having received at least 4 weeks' pay between assignments during the contract.

This model may be a useful option, particularly if it is not possible to obtain satisfactory information about comparable pay conditions. However it must be noted that this does not exempt hirers from applying first day rights to the agency worker. This only excludes the provisions as to pay.

Taken as a whole, it is Orgtel's view that it is preferable to comply with the AWR or to utilise contractors working genuinely on their own account.

Q20. What is Orgtel doing to ensure AWR compliance by 1 October 2011

A. Orgtel will be adopting the following approach to ensure compliance with the AWR.

- Job order registration stage: we will be asking you for rates and conditions of equivalent permanent staff. Information will not be mandatory at this stage, but will encourage good practice and the front loading of compliance if you provide us with this information up front.
- Candidate selection stage: evidence will be obtained as to whether PSC contractors consider themselves "self-employed" and outside the scope of the Regulations.
- Deal stage: AWR information will be mandatory at this stage, unless the PSC contractor has submitted written confirmation of self-employment.
- Compliance from start of contract: no differentiation on process or placements under or over 12 weeks.
- In relation to pay: where we can, one overall rate will be calculated by us to "wrap up" basic pay, holiday pay and bonus.

The wrapped up rate will be broken down into AWR component parts on our placement system in order to obtain confirmation from you and to provide accurate data to our preferred umbrella suppliers and limited companies for payroll purposes.

Q21. Who will make sure that Orgtel is compliant with the Regulations?

A. Firstly, it is our duty to our contractors and to our clients to be

compliant. Secondly, a government department BIS oversees these Regulations; they do monitor us and other agencies and review our systems and processes.

Q22. As a hirer what should we be doing to prepare for AWR implementation day?

A. The period between now and 1 October 2011 gives you the opportunity to review your arrangements for the engagement of temporary workers. In particular, you should consider the following:

- Producing a checklist of information which must be obtained prior to authorisation of a temporary worker role, which will cover AWR points.
- Conduct an audit of differences in working conditions - identify where there may be a problem when the AWR comes into force.
- Can working arrangements be structured so that agency workers will not have an obviously comparable employee to compare themselves with?
- Identify pockets of your temporary agency workforce who may not have equal conditions currently to permanent employees. For these groups, if assignments are usually short term, how difficult would it be to ensure that agency workers do not fulfil 12 week qualifying period? Note however that there are anti avoidance provisions to reduce the scope for this.

Q23. To whom can the agency worker request information about equal treatment from, and when?

A. The AWR gives agency workers the right to ask their agency for information relating to their equal treatment rights. After the 12 week qualifying period has elapsed, the agency worker can request a written statement from the agency, and subsequently from the hirer, but only

if they have not received a response from the agency within 28 days of a request. The agency worker cannot bring a tribunal claim in respect of failure to provide information, but if the worker subsequently brings a claim under the Regulations, for example for breach of the equal treatment rule, an Employment Tribunal can draw an adverse inference from the fact that the information was not provided as requested.

Q24. Will we be liable if the agency worker brings a claim believing that he or she is receiving less favourable treatment compared to our permanent employees doing the same job?

A. In the event of a claim:

Hirer

Will be responsible for day one entitlements.

Temporary work agency

The temporary work agency is primarily responsible for the breach of the equal treatment principle (relating to basic employment and working conditions). The temporary worker agency will have a defence if it obtained or took "reasonable steps" to obtain relevant information from the hirer regarding its basic working and employment conditions and treated the worker accordingly. The hirer will be liable for any breach by the agency to the extent it is responsible for the infringement in providing incomplete or incorrect information.

It is therefore very important that Orgtel works with its clients to obtain accurate and timely comparator information to avoid problems for any party.

Q25. What remedies are available to an agency worker where a breach of the AWR has occurred?

A. An agency worker can bring an Employment Tribunal claim for breach of the AWR. There is no maximum limit to any compensation awarded to successful claimants, but a minimum award of two weeks' pay should normally be awarded by the tribunal in relation to provide equal terms.

If placements have been deliberately arranged to avoid equal treatment there are anti-avoidance provisions with compensation rights of up to £5,000.

Q26. Where can I find out further information about the AWR?

A. BIS has a dedicated Agency Worker Directive and Regulations webpage which provides a link to the government's guidance on the Agency Workers Regulations 2010. The link to the BIS web page is conveniently attached below.

<http://www.bis.gov.uk/policies/employment-matters/strategies/awd>.



"The guidance notes for the AWR will be essential to helping recruiters and their clients comply with the Regulations..."

Ann Swain, Chief Executive APSCo



We hope that these FAQs will assist you in preparing for implementation. We are arranging a number of client seminars with DLA Piper in early September. These events will take place in London and Manchester. We anticipate that by then you will be focusing on implementation and we are keen to give you the opportunity to ask questions and suggest case studies to DLA Piper.

These will be interactive sessions and we need questions and suggestions for case studies from you. If you are interested in receiving more information from us on the AWR, please register your interest in our forthcoming client seminars by emailing awr@orgtel.com

About the authors

Tania Bowers is Legal Director for Orgtel and, with over ten year's experience, is an expert in the recruitment sector. She has extensive experience of all legal and practical aspects relating to the recruitment process, including employment law, commercial contracts, litigation and other regulatory issues. Tania has been actively involved in representing Orgtel interests during the consultation phase and the implementation of the legislation, communicating extensively with the APSCo leadership and its members, the REC, other major recruiters and industry affiliates, such as umbrella management companies. Accordingly, she is well-placed to advise those that use staffing companies on the steps that need to be taken to ensure they fully understand the implications of the AWR and are ready for 1 October 2011.

Adam Hartley is a Partner at DLA Piper, and has an in depth expertise of employment issues arising in the financial services sector and in particular Adam specialises in solving employee disputes, injunctions and other high court employment matters both in the UK and throughout Europe. As well as representing financial services clients, Adam also acts for a number of clients in the recruitment, medical, IT, telecommunications, retail and film industry sectors. In addition to providing strategic advice to solve employment disputes he also provides in-house training and coaching to senior managers/directors of large private and public companies on all aspects of employment law.