

## Agency Worker Regulations: implementation deferred

Employers' organisations and employment agencies have long fought against the controversial introduction into UK law of the EU's Temporary Agency Workers Directive (the **Directive**). That introduction is now a step closer – but not as close as it might have been.

On 18 October 2009, the Government issued the draft Agency Workers Regulations (the **Regulations**) for an eight week consultation period until 11 December 2009. The Government has already decided the underlying policy to be used to implement the Directive, so the main purpose of the consultation is to decide whether the Regulations actually reflect that policy or cause any particular problems and to consider what advice should accompany the Regulations.

However, the Government also announced that it is delaying the **implementation** of the Regulations to 1 October 2011. It has seemingly backtracked on at least the spirit of assurances given by Gordon Brown to the TUC Conference in September. Whilst the Regulations will still be introduced in the next parliamentary session, as promised by the Prime Minister, implementation is now delayed to the eleventh hour before the 1 December 2011 deadline.

The reason given by the Government for this delay is a recognition that "implementation will entail some potentially significant changes in practice for hirers and agencies, who will need time to prepare." They are right.

In addition to the increased cost of providing equal pay to agency workers, agencies and hirers will have to work out how to comply with the requirements of the Regulations as efficiently as possible in order to minimise compliance costs. They will also consider how and whether to try to structure arrangements outside the scope of the Regulations or to apportion liabilities between them.

The Government has also been mindful of the current economic conditions in delaying the Regulations, along with a further 25 pieces of diverse regulation. It therefore seems that the Government wants to make sure that the Regulations are on the statute book before the next election, but to avoid jeopardising votes from the business community by deferring what it would regard as red tape until virtually the last possible moment. The Tories have promised to streamline red tape where possible.

The central provision of the Regulations remains the commitment to give agency workers the right to equal pay with the hirers' own employees after 12 calendar weeks in an assignment. There is no proposal to confer employment status on agency workers – even though an

express right to do so was contained in the Employment Rights Act 1996. Pay means basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on assignment. There may be some scope to avoid paying bonuses structured to reflect the performance of the organisation, linked to appraisals designed for long term management, motivation and performance. However, pay will not include contractual sick pay, pension, maternity, paternity or adoption pay or paid time off.

It is significant that the agency will be responsible for breach of the right to equal treatment but will have a defence if it has taken “reasonable steps” to obtain the necessary information from the hirer and acted “reasonably” in determining the agency worker’s basic conditions. However, the hirer can also be named in the proceedings and each of the agency and the hirer can be liable to the extent it is responsible for the breach. For tactical reasons, the agency worker is likely to bring claims against both hirer and the agency, each of which will therefore face the risk of time, expense and liability from claims.

The agency worker’s remedies will include a declaration, compensation which the tribunal considers just and equitable taking into account the loss suffered (but with no award for injury to feelings) and a recommendation of action to reduce the adverse effect on the worker of the matter of which he has complained.

The draft Regulations will be closely scrutinised by interested parties with a range of often competing interests and further changes are likely. Agencies and hirers should have the best part of 18 months to work out how to cope with the Regulations, but may well need it.

## **Contact**

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