



Equal treatment for agency workers

A guide to the Agency Worker Regulations 2010

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From 1 October 2011, agency workers will benefit from new equal treatment rights. These new rights are contained in the Agency Worker Regulations 2010 (AWR).

This information is intended to be a brief introduction to equal treatment rights for agency workers. The information is for guidance only and should not be regarded as an authoritative statement of the law. It is always a good idea to seek advice from your union (or from an advice agency if not a union member) on your specific situation before taking any action.

This guidance does not apply to agency workers in Northern Ireland.

New equal treatment rights in summary

From day one of an assignment agency workers will have a right to:

- Equal access to collective facilities provided by the hirer
- Information and the opportunity to apply for vacancies in the hirer's workplace

After 12 weeks in the same role with the same hirer agency workers will have the right to:

- equal treatment on pay, holidays and working time
- improved pregnancy rights

Equal treatment rights for agency workers are not retrospective. Any work done by an agency worker for a hirer before 1 October 2011 will not count towards a 12-week qualifying period.

The first day that an agency worker can qualify for equal treatment on pay, holidays and working time entitlements will be 24 December 2011.

Am I covered?

You will be covered by the new equal treatment rights if:

- you are placed by an agency on temporary assignments where you work under the direction and supervision of a hirer **and**,
- you are an employee **or** worker of the agency (i.e. you have a contract of employment or a contract to perform work or services personally with the agency).

You are not covered by equal treatment rights if you use an agency to find permanent work with a hirer. In this case, once you find permanent work, your contract will be with the hirer.

You are not covered by the new equal treatment rights if you are **genuinely self-employed** and run your own business (i.e. you have a business to business relationship with the hirer).

For more information on whether you are likely to be an employee, a worker or self-employed, please see the [TUC Basic Rights at Work website](#).

Day one rights

Equal Treatment on collective facilities and amenities

From 1 October 2011, you will have the right not to be treated less favourably than a comparable employee in relation to collective facilities and amenities provided by the hirer.

Examples of collective facilities and amenities include:

- canteens and staff rooms, waiting rooms
- food and drink machines
- toilet / shower facilities
- crèches,
- transport services (such as local pick-ups and drop offs)
- car parking
- mother and baby rooms
- prayer room
- rest rooms
- accommodation for workers who are required to sleep on site

Where a popular facility such as a workplace crèche has a waiting list, you have the right to request to use this facility and join the waiting list on the same basis as the hirer's employees.

Finding a comparator

As an agency worker, you will have the right not to be treated less favourably than a comparable worker in relation to collective facilities and amenities. You can compare your treatment with someone who:

- Is an employee or worker of the same hirer
- Is doing the same or broadly similar work
- Has a similar level of qualifications and skills (where relevant)
- Works or is based at the same establishment as you (or at a different establishment owned by the hirer if there are no comparable workers at your site).

Can a hirer justify unequal treatment?

Hirers may be able to justify treating agency workers less favourably in relation to collective facilities if they can show that:

- The different treatment is to achieve a **legitimate objective**, such as a genuine business or operational need
- The treatment is **necessary** to achieve that objective and is
- A **proportionate** way to achieve that objective

There are likely to be limited circumstances where hirers can justify not providing equal treatment on collective facilities. The cost of providing a facility to an agency worker is unlikely by itself to be sufficient reason.

Hirers should consider whether there are other less discriminatory ways of trying to achieve the same aim and should also consider whether it is possible to offer partial access to facilities rather than simply exclude agency workers.

Vacancies with the hirer

From 1 October 2011, you will have the right to be informed about vacancies with the hirer while on assignment with them. The aim is to give you the same opportunity as a comparable worker to find a permanent job with the hirer.

A comparable worker is someone who is employed by the hirer to do the same or similar work as you in the same workplace and who has a similar level of skills and qualifications. You cannot compare your treatment with that of a former employee.

The hirer can choose how to inform staff about the vacancies. This may be through e-mail, internet / intranet or through a company newsletter or displaying details on a notice board. But you should have the same access to this source of information as the hirer's employees.

You should be allowed to apply for relevant vacancies. The only exception will be in a redundancy situation where an employer ring-fences posts for redeployment opportunities for staff at risk of redundancy. Hirers can still require certain qualifications, skills or experience when advertising posts.

Equal treatment rights after completing the 12 week qualifying period

Equal treatment on pay

After 12 weeks in the same role with the same hirer, you will have the right to the same **pay**, as if you had been recruited directly by the hirer to do the same job.

Pay includes:

- **Basic pay** that the agency worker would have received if they had been directly recruited by the hirer, based on an hourly, daily or weekly rate of pay, piece rates or the annual salary (usually converted into an hourly or daily rate).

- **Holiday pay**

Unsocial hours payments including enhanced pay for working on **bank holidays or public holidays**

- **Overtime pay** (NB if hirer's employees are required to work a specified number of hours (e.g. more than 35 hours a week) to qualify for overtime, the same rule can apply to agency workers)
- Bonuses based on your individual performance– including **sales commissions** and **performance related pay**
- **Discretionary bonuses** which are paid on such a regular basis that they form part of custom and practice for that workplace
- Vouchers or stamps, such as luncheon vouchers or childcare vouchers, that have a monetary value and can be exchanged for goods or services.

Pay does not include:

- Contractual sick pay
- Occupational pensions
- Maternity, paternity or adoption pay
- Bonuses which are not connected to an individual's performance and which reward loyalty or length of service
- Redundancy pay
- Advances in pay or loans
- Expenses
- Payments linked to financial participation schemes such as share ownership schemes
- Benefits in kind

The Regulations do not affect your existing entitlements to statutory sick pay, statutory maternity, paternity or adoption pay. Agency workers will also have pension entitlements under the new automatic pension enrolment. The DWP and NEST have prepared a useful handout explaining the new pension arrangements: <http://www.dwp.gov.uk/docs/auto-enrol-and-wpr-the-facts.pdf>. If you are unsure, seek advice from your union or from an advice agency.

Agency workers on pay between assignment contracts

The Agency Worker Regulations provide one exemption from the right to equal pay. If you are an employee of an agency and have a right to be paid between assignments where the agency is unable to find work for you, **you will not be entitled to equal pay**, even where you have worked for more than 12 weeks in the same role for the same hirer.

In order for this exemption to apply:

- You must have a contract of employment with the agency; **and**
- You must not be employed on a fixed term contract; **and**
- You must have a contract which includes terms on the following: the minimum pay rates you will receive; the location(s) where you will be expected to work; your expected hours of work during any assignment; the maximum hours you will be expected to work on an assignment; the minimum hours the agency will guarantee you while on assignment (which must be at least one hour); and the type of work you will be expected to undertake; **and**
- You must be paid by the agency between assignments. This must be **at least 50% of the pay** you received on your last assignment or the national minimum wage rate for the hours you worked on the last assignment, whichever is the greater.

The agency must also try to find and offer suitable assignments to you when you are between assignments and not working. Your contract cannot be terminated until there has been an aggregate of at least four calendar weeks between assignments when you were not working but were paid by the agency.

This exemption from equal treatment only applies to pay. You will be entitled to all other equal treatment rights.

Holidays rights for agency workers

Before qualifying for equal treatment

You have a legal right to 5.6 weeks of paid holiday a year entitlement which can include bank or public holidays. These rights are contained in the Working Time Regulations. If you work 5 days a week over a full year, this works out as 28 days paid leave a year ($5.6 \times 5 = 28$). If you work 2 days a week, you will have a right to 11.2 days paid leave a year ($5.6 \times 2 = 11.2$).

For more information on your statutory holiday entitlements please see the [TUC Basic Rights @ Work website](#).

After you qualify for equal treatment

After 12 weeks in the same job for the same hirer, you will have the right to the same **holiday entitlement** as if you had been recruited directly by the hirer to do the same job.

For example, if the hirer's employees are entitled to 35 days holiday a year, you will also be entitled to 35 days leave a year.

If you work part-time, your leave entitlement can be calculated on a pro rata basis.

Holiday pay

You should be paid during your holiday period. You should not receive 'rolled-up' holiday pay or pay in lieu of holiday. The only situations in which you should receive pay in lieu of holidays are where:

- Your assignment with a hirer has come to an end and you were unable to use all your holiday entitlement
- The hirer's employees are entitled to buy out some of their holiday entitlement above the statutory minimum (NB it is unlawful for a hirer or an agency to buy out your statutory holiday entitlement).

Requesting and taking holiday

After qualifying for equal treatment you should be treated the same as the hirer's employees when requesting and being permitted to take holidays.

For example:

- Where a hirer requires their employees to give notice before being able to take leave, you can be required to give the same period of notice.
- A hirer / agency should not refuse you time off during the summer season when the hirer's employees are permitted to take leave.

Bank holidays and public holidays

After completing the 12 week qualifying period you will be entitled to equal treatment on:

- Enhanced pay for working on bank holidays or public holidays
- The right to time off on bank holidays or public holidays.

Equal treatment on Working Time entitlements

After 12 weeks in the same job for the same hirer, you will have the right to the same **working time entitlements** as if you had been recruited directly by the hirer to do the same job.

This includes equal treatment on:

- The length of your working time (e.g. you cannot be required to work a longer shift patterns than the hirer's employees)
- Rest breaks and rest periods (e.g. you are entitled to the same lunch breaks and breaks between shifts as the hirer's employees)
- Night work, including the number of hours night work and rates of pay for night work
- Pay during travel time during working hours; on call pay; and standby payments

Establishing equal treatment

The approach taken to equal treatment in the Agency Worker Regulations is different to that used for other equal treatment rights.

After the 12 week qualifying period, you will have the right to the same pay; holiday and working time entitlements **as if you had been recruited directly** by the hirer to do the same job.

The key question is 'what pay, holidays and working time entitlements would I have been entitled to if I had been directly recruited by the hirer to do the same job?'

You will also only have the right to equal treatment on pay and conditions *ordinarily contained in the contracts of the hirers' employees or workers.*

In most workplaces it will be easy to assess whether you are receiving equal treatment by comparing your pay and conditions with those contained in collective agreements, staff handbooks, pay scales or standard contracts of the hirers' employees or workers.

But where a hirer employs staff on genuinely individualised pay rates, you may not be covered by equal treatment rights.

It is also important to be aware that a hirer or agency can defend a claim for unequal treatment if they can identify a comparable employee on the same pay and conditions as you.

For this defence to work, the comparator must be a current employee of the hirer and must do the same or similar work as you. Where relevant they should have a similar level of skills and qualification. They should also work in the same workplace as you. However if there are no comparable employees in your workplace, the hirer and agency can use a comparator who works in another workplace owned by the hirer.

Calculating the 12 week qualifying period

You will qualify for equal treatment on pay, holidays and working time entitlements after working for **12 calendar weeks** in the **same role** for the **same hirer** on one or more assignments.

Every week in which you do any work for a hirer will count as a calendar week, even if you only work a few hours or a couple of days. A calendar week is likely to comprise of a period of 7 days, starting with the first day of your assignment.

It does not matter if you are supplied by more than one agency during your qualifying period. It is also possible to be accrue qualifying periods with more than one hirer at the same time.

The qualifying period as a 'stopwatch'

One way of explaining the qualifying period is to think of it as a 'stopwatch'. Certain breaks during or between assignments or changes in your role for a hirer will cause the 'stopwatch' to be reset to zero and your qualifying period will start again. Certain breaks during or between assignments will cause the 'stopwatch' to pause. It will then continue to tick if you return to the same role with the hirer. In some situations the stopwatch will continue to tick even though you are absent from work.

Reasons which reset the stopwatch to zero

Your stop watch will be reset to zero and your qualifying period will start again:

- If you have **a break of more than 6 calendar weeks** during or between an assignment (and the reason for the break does not pause the stopwatch or mean it continues to tick – see below)
- Where you remain with the same hirer but start **a new role** involving substantively different work or duties with the hirer

If you finish an assignment with a hirer and go to work for another hirer, your stopwatch with the original hirer will be reset to zero. That is unless you return to work for the original hirer in the same role in *less than 6 weeks*.

Breaks during or between assignments

If you have a break of more than 6 calendar weeks during or between assignments with a hirer your stopwatch will normally be reset to zero. If the reason for the break is one of those listed below your 'stopwatch' will either pause or continue to tick.

Breaks which cause the 'stopwatch' to pause:

- A break for any reason of 6 calendar weeks or less
- You are unable to work because of sickness or injury
- You are taking time off or leave to which you have a contractual or statutory right (e.g. annual leave or time off for trade union duties)
- Jury service for up to 28 weeks
- Where the hirer temporarily does not require any workers to be present for example due to a customary factory shut downs or summer vacations
- Due to strikes or industrial action in the hirer's workplace

Breaks where the 'stopwatch' continues to 'tick'

- Any period of sick leave for pregnancy-related reason
- Any leave for maternity related reasons for up to 26 weeks after childbirth (NB this applies even if the agency worker does not have a statutory or contractual right to maternity leave)
- Any period of contractual or statutory maternity, paternity or adoption leave.

NB: If you are absent due to family related reasons, your stopwatch will only continue to tick for the period that your assignment would have or was expected to last. During any period where your last assignment would have ended, your 'stopwatch' will be paused.

Different types of consecutive leave

It is possible for different reasons for absence to run consecutively and not to break continuity for the purposes of the 12 week qualifying period. For example, an agency worker is on sick leave for the last two weeks of an assignment in a packing factory. The assignment then ends and there is a break of 5 weeks. The agency worker then

starts a new assignment in the same role in the packing factory but he will not have to start a new qualifying period. Although altogether he has had a break of more than 6 weeks, the stopwatch was paused during the period of sick leave and therefore the stopwatch is not reset to zero.

A new role

To qualify for equal treatment you must work for 12 weeks in the **same role** with the same hirer.

Your qualifying period will be reset to zero if:

- You start a **new role** with the hirer **and**
- The whole or main part of the new role **involves substantively different work or duties**

What will be a substantively different role?

In order to have started a 'substantively different' role, there should be a genuine and significant difference to the role, involving different job functions or tasks; requiring use of different skills and / or a significantly different pay rate. It is not enough that your line manager has changed or you are working in a different department but doing essentially the same job for the same hirer.

Informed in writing

It is important to be aware that your stopwatch will only be reset to zero if the agency has written to you informing you in writing of the type of work you will be required to do in the new role.

Anti-avoidance measures

The Agency Worker Regulations include provisions which seek to prevent hirers and agencies from hiring you on a succession of assignments or from rotating you within an organisation in order to prevent you from qualifying for equal treatment rights.

The anti avoidance provisions apply:

- if you have been moved to more than two substantively different roles with the hirer (or within a company associated

with the hirer) or you had been hired on a succession of more than 2 assignments with a hirer **and**

- the most likely reason why you were rotated or hired on the succession of assignments was because the agency or hirer (or associated company) intended to prevent you from qualifying for equal treatment **and**
- you would have qualified for equal treatment if you had not been moved or hired on a succession of assignments.

Where an Employment Tribunal decides that a hirer or agency has breached these anti-avoidance provisions, they can award you up to £5,000.

Rights for pregnant agency workers and new mothers

The Agency Worker Regulations extend two existing rights for pregnant employees to agency workers **once they have completed the 12 week qualifying period**. These are:

- The right to **reasonable paid time off to attend ante-natal appointments** when on assignments.
- The right to be **offered an alternative assignment for pregnancy related reasons or to be suspended on full pay** where a suitable alternative assignment is not available.

These rights apply from day one to agency workers who are employees of an agency.

For more information on these rights please go to

http://www.direct.gov.uk/en/Employment/Understandingyourworkstatus/Agencyworkersandemploymentagencies/DG_198949

Enforcing your rights

If you are not receiving your rights to equal treatment you may be able to take a claim to an Employment Tribunal. You should always seek advice from your union or the ACAS Helpline before making a claim to an Employment Tribunal.

As with most statutory rights there is a 12 week time limit for claims to an Employment Tribunal.

Where an Employment Tribunal finds that your rights under the Agency Worker Regulations have not been complied with they will make a declaration and award a minimum of two weeks' pay to the agency worker. Where an agency worker successfully demonstrates that the anti-avoidance measures have been breached the Tribunal will be able to award up to £5000 compensation.

Sources of further information and advice

Gangmasters Licensing Authority (GLA)

To report any problems with your employer to the GLA if you work in one of the sectors covered, telephone 0845 602 5020

<http://gla.defra.gov.uk>

Directgov

Directgov is the UK government's digital service for people in England and Wales. It delivers information and practical advice about public services, bringing them all together in one place. You can access Directgov on the web or on your mobile.

www.direct.gov.uk

Pay and Work Rights Helpline

If you have a question or want to make a complaint about an **employment agency**, you should contact the Pay and Work Rights Helpline on 0800 917 2368

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

For **national minimum wage (NMW)** enquiries and complaints and help and advice on the rules of the NMW ring the Pay and Work Rights Helpline on 0800 917 2368

www.hmrc.gov.uk

ACAS

The Acas Helpline is the place to go for both employers and employees who are involved in an employment dispute or are seeking information on employment rights and rules.

Call 08457 47 47 47

www.acas.org.uk

TUC sources of information

www.worksmart.org.uk

BasicRights@Work

<http://www.tuc.org.uk/workplace/tuc-19833-f0.cfm>