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**Independent Contractor Services
Guide to the Agency Worker Regulations 2010
“AWR”**

Background

The AWR will come into force on the 1st October 2011 in the UK. The aim of the Regulations is to ensure that temporary workers have the same basic employment and working conditions as comparable employees who are directly employed by the Hirer.

There are two steps to the AWR. The temporary worker will receive rights on Day 1 and after completing a 12 week qualifying period, regardless of whether they are full or part time.

Day 1 Rights

- Access to shared on-site facilities, including canteens, child-care facilities and transport services
- Access to information about any relevant employment vacancies that the hirer has

12 week Rights

Comparable employment terms and conditions as an equivalent directly recruited employee including:-

- Pay, including overtime and shift allowances
- Bonuses that are attributable to the worker's individual performance
- Holidays and holiday pay
- Working hours (including length of night work, rest periods and break periods)
- Protective rights when pregnant, including paid time off for ante-natal appointments and workplace assessment.

Pay does not include:-

- Bonuses (that relate to the hirer's corporate performance or are given to award long service)
- Expenses (although agency workers' pay for comparison purposes may include reimbursement for expenses if they work through an umbrella company)
- Company Pension Schemes
- Health or Life Insurance/Assurance schemes
- Share Option Schemes
- Occupational Sick Pay schemes (Agency Workers already have a right to receive Statutory Sick Pay)
- Occupational Maternity/Paternity/Adoption pay
- Redundancy Pay (statutory or contractual)
- Notice Pay (either statutory or contractual that is linked to the loss of employment).

Who will the regulations affect?

Essentially there are 3 parties that are affected under the AWR.

The Temporary Worker – who will have additional protection under the AWR

The Hirer – who hires temporary workers by entering into a contract with a Temporary Work Agency

The Temporary Work Agency – this includes any Recruitment Agency or Umbrella Company that supplies or pays for temporary workers to work temporarily under the supervision and direction of the Hirer.

Who are excluded from the Regulations?

Contractors that are in business in their own right and are genuinely self-employed will not be covered by the AWR. In addition, fixed term employees, consultants or employees placed in permanent employment by an employment agency and those engaged through a managed service contract will fall outside the scope of the AWR. Workers who operate through a limited company may fall outside the scope of the AWR but if the relationship of worker, temporary work agency and hirer can be identified and the worker is not really in business on their own account, they are likely to be entitled to AWR rights. Workers who opt for the Swedish Derogation model will not be entitled to equal pay under the AWR, but they should nevertheless be granted Day 1 rights and, after satisfying the 12 week qualifying period, equal working conditions.

What is our position and what solutions are available?

ICS will operate in full compliance with the new regulations and offer a range of services to our potential employees and clients.

- We have made some operational modifications to our Umbrella Service to ensure that the key points within the regulations are addressed, making it a suitable and effective solution which will enable us to use our existing overarching employment contract. One of the key aspects to this is ensuring that the hirer provides us with information relating to comparable pay and working conditions. This Risk Based approach will ensure that we have the relevant information to assess and ensure that temporary workers are treated fairly.
- Contractors that are genuinely self-employed will not be affected by the new legislation and may continue to utilise our Limited Company and Sole Trader Services.
- In addition to the traditional range of services that we offer, our employees will now have the option to enter into an employment contract under what is known as the Swedish Derogation model.

What does Swedish Derogation mean?

When the Agency Workers Directive was debated at EU level a derogation clause was negotiated by the Swedish delegation and this has now been adopted in the AWR.

Essentially it means that the AWR rights relating to equal pay (including holiday pay) do not apply to agency workers who are employed on a permanent basis by their umbrella company or temporary work agency and are entitled to receive pay in between assignments, when there is no alternative suitable work.

There are conditions to this though, with the first one being that the agency worker needs to be genuinely employed by the umbrella company or temporary work agency under a permanent contract of employment, which must be entered into before the worker starts their first assignment under that contract.

An agency worker may consider that this is a route that they would like to consider and should discuss this with their umbrella company or temporary work agency.

Some of the key factors of the Swedish Derogation Model:-

- The worker must be clearly informed about the impact of entering into the Swedish Derogation contract.
- Specific terms must be included within the permanent contract that will apply across assignments including: the nature and location of the work, the minimum and maximum

expected hours, the minimum rate of pay and its calculation, and acknowledgement that the worker will not be entitled to equal pay under the AWR.

- Provided you are available to work and you have completed your first assignment under the employment contract, your temporary work agency must take reasonable steps to seek suitable employment for you between assignments and must ensure that any suitable available work is offered to you.
- The agency must pay you during non-working periods between assignments at the minimum amount.
- The “minimum amount” must be at least 50% of the worker’s basic pay calculated according to a reference period whilst on assignment and must be at least National Minimum Wage.
- The contract cannot be terminated by the employer until the employee has received the minimum amount, for an aggregated period of not less than 4 calendar weeks.

ICS intend to offer a Swedish Derogation model once a suitable framework for this approach has been established, particularly regarding the additional responsibilities and costs that will need to be considered as part of the process.

Frequently Asked Questions

Why has the AWR been introduced and what impact does it have on me?

Principally the AWR places a responsibility on your employer and others involved in the recruitment process to ensure that temporary workers are treated fairly in respect of their pay and working conditions. There are various checks and procedures that these parties will need to introduce to ensure they comply with the regulations. In reality, you may not see any change to your position as most companies will build the necessary requirements into their recruitment process.

Is it safe to use an umbrella company?

You need to ensure that your umbrella company has taken the appropriate steps to comply with the AWR. At ICS we have had a total focus on compliance since our formation in 2002 and confirm that our Umbrella Solution is fully compliant with the AWR. We will continue to work with your Employment Agency to ensure that the appropriate responsibilities are upheld.

When are temporary workers covered?

The AWR only apply to basic pay and working conditions once temporary workers have undertaken the same role for 12 continuous weeks with a hirer.

Agency workers have the right of access to employment vacancies with the end user and access to collective facilities and amenities (e.g. staff canteens, child care facilities and provision of transport services) from the start of their assignment.

Can I just register myself as self-employed?

Individuals that are genuinely self-employed are not subject to the AWR. If you register yourself as self-employed, you need to ensure that you are in fact genuinely self-employed; otherwise you may face a challenge from HMRC in respect of your working status, which may lead to additional taxes and penalties being due. At ICS we have a self-employment checklist to help guide you through the

process and enable you to review whether you are self-employed. If you are in any doubt we would not recommend that you elect to register yourself as self-employed.

Is there a specific sector or type of role that the AWR will mainly affect?

The AWR will apply to all UK temporary workers regardless of sector or earnings, however given the main thrust of the Regulations is to ensure equal pay and working conditions between temporary and directly recruited employees, we anticipate that the vast majority of our white collar employees will not be affected once the AWR come into force.

Our experience of the market suggests that the AWR will have most relevance for those employees earning less than £15 per hour, where in some instances and sectors it is felt that temporary workers may not have received equal pay and employment conditions, compared to directly recruited employees.

What do I do if I feel that I am not being treated in compliance with the AWR?

We believe that the vast majority of our employees and clients will not see any direct changes as a result of the legislation; however we recommend that you should bring any concerns to the immediate attention of your employer, recruitment agency or the client for whom you are undertaking the assignment.

Under the AWR, you are entitled to information relating to your AWR entitlements if you feel that your rights have been infringed. You should request Information about your Day 1 rights from the hirer, because they will have sole control over the on-site facilities and vacancy information available to you. The hirer will have 28 days to respond in writing upon receipt of your request.

Once you have completed your 12 week qualifying period, if you would like information about your equal pay and working conditions, you should request it from the temporary work agency, which will also have 28 days to respond. If you receive no response from the agency after 30 days, you can request the information from the hirer. It would be useful to outline the reasons for your concerns in order that an appropriate review may be conducted. If you are unsatisfied with the response, or you receive no response, you can bring a claim in the Employment Tribunal, provided you bring your complaint within 3 months of the alleged breach.

Whilst we acknowledge that it is important to ensure that you receive your entitlements under the AWR, Employment Tribunal proceedings are time consuming and costly for all parties, and recourse to Tribunal intervention should be considered carefully. Like any dispute we would always recommend that it is resolved between the parties wherever possible.

How is the 12 week qualifying period calculated?

To complete the qualifying period an agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, either on a full or part time basis. Any time spent on assignment before the 1st October 2011 does not count towards the qualifying period.

If there is a break in the assignment in excess of 6 weeks or if the temporary worker takes up a new role with the Hirer which is substantially different, then the 12 week qualifying period will be reset.

There are some exceptions to this rule which effectively pause the clock until the temporary worker returns to work including:-

- A break for any reason that lasts no more than 6 weeks
- Annual leave
- Shutdowns e.g. Factory closure
- Sickness of up to 28 weeks
- Jury Service up to 28 weeks
- A break at the hirer caused by strike, lock out or industrial action

Pregnancy and maternity-related absences, maternity leave, paternity leave and adoption leave will not pause the 12 week clock: instead the 12 week qualifying period will continue throughout the duration of the absence and include these weeks as those counting towards the 12 week total.

How will ICS work with Recruitment Agencies and End Clients in the future?

We strongly value our commercial relationships and expect to work more closely with recruitment agencies and end clients, given the flow of information and operational procedures that the parties must introduce in order to grant temporary workers their AWR rights and to avoid any risk for those involved in the supply chain.

We believe that the vast majority of our employees will not be affected by the AWR; however we have drafted new Employment Applications and introduced appropriate operational procedures to ensure that we and our partners operate compliantly.

We do expect that as we move closer to AWR implementation and during the first few months when the AWR come into force, we will revisit and refine these practices in conjunction with our partners, to ensure that they remain robust and operationally appropriate and effective. In the interim we are happy to work with recruitment agencies and end clients to establish a framework of operational procedures and compliance, in readiness for AWR implementation.

ICS has worked with recruitment agencies and end clients since our formation in 2002 and we have established an excellent reputation of trust, care and compliance. The Introduction of the AWR will only develop this to another level as we will continue to provide a range of AWR compliant services, including the Swedish Derogation model. Having successfully steered through MSC and IR35 we remain confident that we are well placed in this sector, particularly given the breadth of services that we provide.

Some of the key practices and changes that will need to be considered by hirers, agencies and umbrella companies as a result of AWR:-

- TWA will need the hirer to provide details of comparable pay and working conditions Hirer will need to advise TWA of any changes in comparable workers pay and working conditions.
- Hirer must assess workers' access to on-site facilities to provide equal access to comparable Agency Workers.
- TWAs will need to collect details of employees' previous assignments, to ensure that it calculates the 12 week qualifying period correctly.
- Service Level Agreement or Revised Terms of Business to accommodate responsibilities of each party.
- Any additional costs and who will be responsible for them under the Swedish Derogation model

The liability for failure to provide Day 1 rights rest solely with the hirer because it has total control in delivering these entitlements. Liability for failure to provide basic working and employment conditions will rest with the TWA and/or the hirer to the extent that each is responsible. Even if a temporary worker brings a claim against one party, the Employment Tribunal can join the other party to the claim to ensure that liability is apportioned so that each party is liable to the extent that they are to blame for the infringement. Agencies will have a defence if they can show they took reasonable steps to obtain relevant information from the hirer about the basic working and employment conditions for comparable staff and ensured that the worker was given equal rights on the information supplied. Although the AWR aim to ensure that liability is fairly attributed, it is critical for all parties ensure that robust processes are in place.

The detail within this Guide is our interpretation of the AWR which comes into effect on the 1st October 2011, having received appropriate advice from our professional advisors. We expect that interpretation of the legislation will develop once cases are brought to the Tribunal for determination and we will update on our position in respect of the Regulations accordingly.