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

Background

The AWR came 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 using our overarching employment contract. One of the key aspects to this is ensuring that the hirer or agency provides us with information relating to comparable pay and working conditions, or confirms that the temporary workers employment terms and conditions meet or exceed those of comparable employees. This 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 a temporary worker is available to work and has completed their first assignment under the employment contract, the temporary work agency must take reasonable steps to seek suitable employment for the temporary worker between assignments and must ensure that any suitable available work is offered to them.
- The Umbrella Company must pay the temporary worker during non-working periods between assignments at the minimum amount. Funding of this would need to be agreed between the Hirer, Agency and Umbrella Company.
- 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 offer a Swedish Derogation model that is approved by Counsel and delivers a cost effective solution for the agency and ourselves. We would be delighted to discuss this with you.

Frequently Asked Questions

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

Principally the AWR places a responsibility on the 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 adopt to ensure they comply with the regulations. In reality, a temporary worker may not see any change to their 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 the umbrella companies that you choose to work with have 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 work closely with you to ensure that our 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 a temporary worker just register themselves as self-employed?

Individuals that are genuinely self-employed are not subject to the AWR. If a temporary worker registers themselves as self-employed, they need to ensure that they are in fact genuinely self-employed; otherwise they may face a challenge from HMRC in respect of their working status, which may lead to additional taxes and penalties being due. At ICS we have a self-employment checklist to

help guide our contractors through the process and enable them to review whether they are self-employed. If they are in any doubt we would not recommend that they elect to register as self-employed.

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

The AWR applies 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 by AWR. That said there will be clear responsibilities on Hirers, Agencies and Umbrella companies to share comparable pay information and to ensure that the temporary workers rights are upheld.

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.

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 are working closely with our recruitment partners to ensure that all of our responsibilities are upheld. We have invested significant time in ensuring that our model is fully compliant. We can offer derogated and non derogated employment options all approved by our leading professional advisors and backed by Counsel Opinion.

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

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 AWR is helping us develop this to another level as we continue to provide a range of compliant services, including a Counsel approved 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

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, 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.