



Creative Contracts Needed if - or when - new Agency rules arrive

In May 2008, the Government agreed with the TUC and the CBI to drop its resistance to the proposed EU Agency Workers Directive (AWD), providing that it gave agency workers the right to 'equal treatment' (in other words, basic pay) after 12 weeks on an assignment. In effect, its support was conditional on being allowed to continue the UK's opt-out (probably in a slightly more limited form) under the working time directive.

The UK proposal was broadly agreed at the European Council of Ministers on 9th June but it's unlikely that any implementing legislation will take effect until late 2010.

What new rights would agency workers receive?

If the EU adopts the directive, agency workers would, from week 12, be entitled to the same basic pay as comparable permanent employees. Other benefits, such as share option schemes, company sick pay and the right to join an occupational pension scheme, are not included.

Who would be a comparator?

It may prove difficult to identify a comparable permanent employee. Agency workers often do tasks that the permanent workforce is not available or qualified to perform. The legislation will have to solve these "no obvious comparator" problems because there are no plans to include hypothetical comparators. It remains to be seen what basic pay a worker with no comparator will be entitled to.

Will any temps be excluded?

The directive is vague on whether contractors – individual workers who supply their services through limited companies – will be entitled to the new rights. But it is likely to allow countries to exclude agency workers employed, and paid between assignments, by a staffing company. Many agencies may adopt this model or engage their agency workers via so-called umbrella companies to avoid the legislation. There may be some debate about whether "minimum annual hours" contracts should fall within this exclusion. If this does not apply in the UK, chaos may ensue, because any organisation – not only staffing companies – seconding employees to end-users would be caught.

Which employer will be liable for breaches?

The duty to comply with the legislation is likely to fall on staffing companies rather than end-user organisations. Staffing companies will need full information from end-users about comparable permanent employees' pay to fulfil their obligations.

Difficulties may arise if end-users are unwilling to hand over detailed pay data, especially if they fear that employees will be poached. Also, there may be breaches of data protection law if temps and staffing agencies can work out what identifiable permanent employees are being paid.

Will the cost of employing agency workers rise?

Users of agency workers in engineering, IT and professional roles are unlikely to be affected, because these individuals probably already receive better basic pay than comparable permanent employees. But employers with lower-paid temps will notice the difference. Staffing companies will be reluctant to swallow the extra costs if they find that they are making a loss. Either way, end-users' costs are likely to increase.

Workplace agreements about what agency workers should be paid will be allowed to override the legislation. This mechanism may actually keep employers' costs down, since agency workers are unlikely to be part of the negotiation. And will permanent employees really fight for temps to be paid as much as them?



What's the best way to use temps and avoid breaches of contract?

End-user organisations could:

- » Ask their staff suppliers to employ and pay the temporary workers (or get an umbrella company to do that), then second the workers to them.
- » Make more use of limited company contractors, as opposed to traditional PAYE agency temps. (Ironically, this may reduce the government's tax revenue).
- » Engage agency workers for only 11 weeks at a time (although short gaps between assignments with the same company will be treated as no break in continuity).
- » Engage agency workers on a project or piecework basis, so that they are paid for work done rather than time spent on the job. The worker could not be under the control or supervision of the end-user or be obliged to perform the work personally – otherwise, the relationship may be interpreted as permanent employment
- » Treat all temps as trainees when establishing what they should be paid. This approach is common in France, where similar measures are already in place.

Reference source - Law at Work. Written by David Gibson. Available for download at:

<http://www.peoplemanagement.co.uk/pm/articles/2008/06/creative-contracts-needed-if-or-when-new-agency-rules-arrive.htm>