



# Agency Workers Regulations

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## Update Information

This model policy will be subject to ongoing review and may be amended prior to the scheduled date of the next review in order to reflect changes in legislation, statutory guidance, or best practice (where appropriate).

## 1. Introduction

The Agency Workers Regulations 2010 ("the Regulations") came into force on 1st October 2011 giving agency workers the entitlement to the same basic employment and working conditions as if they had been recruited directly, if and when they complete a qualifying period of 12 weeks in the same job. However, some of the new rights apply from the first day of an agency worker's assignment ("day 1 rights").

The qualifying period is not retrospective, and for those agency workers already on assignment, the 12 week qualifying period will start from 1st October 2011.

An agency worker whose rights have been infringed under the Regulations will be able to bring a claim in the Employment Tribunal against the temporary work agency ("TWA") and/or the hirer, as appropriate, for a declaration of their rights and for compensation. While there is a minimum compensatory award of two weeks' pay, there is no maximum limit on the amount that can be awarded.

The Regulations refer to the person who hires a temporary agency worker from a TWA as the 'hirer'. For the purposes of this guidance the 'hirer' is the School.

Individuals outside the scope of the Regulations include the genuinely self-employed, individuals on secondment or loan and the introduction of workers to the School by recruitment agencies for fixed term or permanent employment.

Definition of certain terms which are contained within this guidance are included at Appendix A.

## **2. Day 1 rights for all agency workers**

### **Access to Collective Facilities and Amenities**

From day one of an assignment, agency workers are entitled to be treated no less favourably than a comparable employee in relation to access to collective facilities and amenities, provided by the hirer.

This is not intended to extend to all benefits which a hirer might provide to directly recruited employees, rather it applies to collective facilities provided by the hirer such as:

- Canteen or other similar facilities
- Workplace crèche
- Transport facilities
- Toilet/shower facilities
- Staff Common Room
- Waiting Room
- Mother and baby room
- Prayer Room
- Food and drinks machines
- Car parking.

This is a non-exhaustive list and acts as an indication of which kind of facilities should be included. It applies to facilities provided by the hirer and therefore these facilities will usually be on site. Hirers can provide agency workers with information about their facilities, for example as part of an induction pack, or provide information to the TWA to pass to the agency worker as part of the information about the assignment.

The hirer is responsible for providing equal treatment for day 1 entitlements and is liable for any breach of this obligation given that the TWA agency has no control over providing the agency worker with access to facilities when they are on an assignment.

### **Access to information on job vacancies**

All agency workers will be entitled to be provided with information about any relevant job vacancies within the hirer that would be available to a comparable employee. The hirer should inform the agency worker where and how to access the vacancy information e.g. the Schools Recruitment Service website.

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## **3. Rights after 12 weeks in the same job with same hirer**

After completing a qualifying period of 12 continuous calendar weeks with the same hirer, in the same role, agency workers will be entitled to have the same basic working and employment conditions as if they had been employed directly by the hirer. These are:-

- Key elements of "pay" (see below)
- Duration of working time
- Night work
- Rest periods
- Rest breaks
- Annual leave

- Paid time off for ante natal appointments

'Pay' includes

- Basic pay based on the annual salary an agency worker would have received if recruited directly (usually converted into hourly or daily rate, taking into account any pay increments)
- Overtime payments, subject to meeting the qualifying criteria for overtime
- Shift/unsocial hours allowances, risk payments for hazardous duties
- Payment for annual leave (any element above the statutory minimum of 5.6 weeks can be added to the hourly or daily rate)

'Pay' excludes

- Occupational sick pay
- Occupational pension
- Occupational maternity, paternity, or adoption pay
- Other contractual and statutory paid leave (such as compassionate leave and Jury Service)
- Redundancy pay (Statutory or Discretionary)
- Notice pay (Statutory or Discretionary)
- Payment for time off for Trade Union duties
- Guarantee payments as they apply to directly recruited staff if laid off
- Advances in pay or loan e.g., for season tickets
- Expenses such as accommodation and travel expenses
- The majority of 'benefits in kind' which have a monetary value
- Any bonus or incentive payment that is not directly attributable to the amount or quality of work done by the worker and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward long service

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## 4. Calculating the 12 week qualifying period

The 12 week qualifying period is triggered by working in the same job with the same hirer for 12 calendar weeks. Calendar weeks will be accrued regardless of how many hours the agency worker does on a weekly basis.

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## 5. Accrual of the 12 week qualifying period

The qualifying period is not retrospective. An agency worker will only start to accrue the 12 weeks qualifying period after the Regulations come into force on 1st October 2011 even if the assignment started before 1st October 2011.

An agency worker can qualify for equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one agency over the course of that period of time.

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## 6. The Qualifying Clock

The working patterns of agency workers can be irregular. The Regulations therefore provide a number of circumstances in which breaks do not prevent agency workers from completing the qualifying period.

These provisions can best be explained by thinking of the qualifying period as a clock which runs from 0 to 12. Sometimes a gap between assignments, or a move to a new assignment, will mean that the clock is reset to 0 and must start again. In

other circumstances a break will merely 'pause' the clock which will then continue to 'tick' when the agency worker returns. In some limited circumstances, the clock will continue to 'tick' even if the agency worker is not working on an assignment.

Reasons for the Qualifying Clock to reset to zero:

- Most commonly it will be because an agency worker begins a new assignment with a new hirer
- Where an agency worker remains with the same hirer but takes a new role that is 'substantively different'
- If there is a break between assignments with the same hirer of more than 6 weeks (which is not one which 'pauses' the clock or during which it continues to 'tick')

Types of break that will cause the qualifying clock to 'pause':

- A break for any reason where the break is no more than 6 calendar weeks and the agency worker returns to the same role with the same hirer
- A break of up to 28 weeks because the agency worker is incapable of work due to sickness or injury
- Any break which is for the purpose of taking leave to which the agency worker is entitled, including annual leave
- A break up to 28 calendar weeks to allow the agency worker to perform jury service
- A break caused by a regular and planned shutdown of the workplace by the hirer (for example at Christmas, or school holidays where the agency worker is hired to work term-time only)
- A break caused by a strike, lock out or other industrial action at the hirer's establishment

Breaks where the clock continues to 'tick':

- Breaks due to pregnancy, childbirth or maternity which takes place during pregnancy and up to 26 weeks after childbirth
- Any breaks due to the worker taking maternity leave, adoption leave or paternity leave

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## 7. Anti-Avoidance Provisions

The Regulations contain anti-avoidance provisions which prevent a series of assignments being structured so as to prevent an agency worker from completing the qualifying period. The following example illustrates this:

**"An agency worker completes 2 or more assignments with the same hirer, where they have already worked 11 weeks with a 6 week break and then a further 11 weeks with another 6 week break. If the agency worker is then taken on for a third assignment, this could be considered as an attempt to avoid the completion of the qualifying period, but it would need to be clear that the attempt was deliberate. This would be a matter for the employment tribunal in the event of a claim."**

The Regulations stress that there is nothing to prevent a hirer from adopting a policy for not retaining agency workers for more than 11 weeks. However, a pattern of assignments provided to the agency worker that is designed to deprive an agency worker of their entitlements would fall under the anti-avoidance provisions.

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## 8. To comply with the Regulations

At the start of the assignment the school must provide the TWA agency with:

- A job description including the grade and a person specification
- The start date and expected duration of the assignment

- The hours of work involved

Also ensure that from the first day of their assignment, the agency worker is informed of, and provided with access to:

- all of the hirer's staff facilities and amenities and
- information on any job vacancies within the hirer.

The hirer will need to provide the TWA agency with the details given below if and when an agency worker completes 12 weeks in a given job. As the entitlement to equal treatment begins in week 13, this information should be provided promptly when it is evident that the assignment will last more than 12 weeks:

- the level of basic pay (based on the annual salary an agency worker would have received, as if recruited directly), if and when there are overtime payments and shift/unsocial hours allowances or risk payments for hazardous duties
- types of bonus schemes the hirer operates (and how individual performance is appraised and information on annual pay increments)
- any vouchers on offer that have monetary value
- annual holiday entitlement
- any known health and safety risks and the prevention measures introduced

A template is included at Appendix B.

The entitlements that are due after 12 weeks' qualifying period are the responsibility of the TWA to provide to the agency worker. However, the hirer must co-operate to ensure that the TWA is provided with the required information.

The TWA is responsible for pay and benefits for the agency worker. The TWA must ensure that the agency worker is treated fairly and in compliance with the Regulations working in partnership with the hirer. In addition, the TWA must ensure that all agency workers are eligible to work in the UK and can fulfil the hours of the role they are assigned with any visa restrictions. They are also responsible for any disclosure checks if applicable.

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## 9. Agency Worker - Raising concerns about treatment

Where an agency worker has a concern that they are being treated less favourably in terms of their rights under the Regulations, they are entitled to raise their concerns in writing with both the TWA and the hirer and ask for information and identify comparators where applicable.

The hirer will need to be able to respond to and justify any such concerns. A response should be provided to the agency worker within 28 days.

If not satisfied, agency workers do have the right to raise a claim and to take these through to employment tribunal.

Hiring managers should be aware that agency workers are protected from any form of detriment for asserting their rights under the Regulations. A detriment could include terminating an assignment.

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## 10. Additional Guidance

The rate of pay should be commensurate with the role i.e. if the TWA supplies a cover supervisor the rate of pay should be consistent with the supervisory role that they perform based on the appropriate job evaluated grade, even though they may be a qualified teacher.

Where the TWA supplies a teacher to actively teach pupils (specified work), the teacher should be paid as a qualified teacher. After 12 weeks the teacher should be paid in accordance with the School Teachers' Pay & Conditions Document.

The Regulations include annual leave provisions so the daily rate should be based on 195 working days per annum. For support staff, after 12 weeks the agency worker should be paid at the evaluated grade for that post. Where the annual leave related to the post is over and above the statutory holiday entitlement (5.6 weeks), this should be included in the daily/hourly rate paid to the agency worker.

It is important that the schools keep a record of all agency workers who have worked at the school on a temporary assignment, so as to monitor the accrual of weeks clocked up towards the qualifying period so that they can meet their obligations under the Regulations by providing appropriate information to the TWA. A separate template can be found by accessing this Policy on the School website (see Appendix C).

The Government has issued guidance for schools on the use of temporary staff: "Deal for schools - hiring supply teachers and agency workers" - this can be viewed on the [GOV.UK website](#).

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## **11. Appendix A - Definition of Terms**

### **The Temporary Work Agency (TWA)**

A Temporary Work Agency (TWA) supplies agency workers to work temporarily for a third party (the hirer). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract with the TWA.

### **The Agency Worker**

An agency worker (often referred to as a 'temp') is someone who has a contract with the TWA which is a contract of employment or any other contract to perform work or services personally for the TWA but works temporarily for and under the direction and supervision of a hirer.

### **The Hirer**

The hirer (end-user) is a 'person' e.g. company, partnership, sole trader, public body, which is engaged in economic activity (whether or not for profit) and which books agency workers via a TWA.

### **'New' Hirer**

The qualifying clock will be reset to zero if the agency worker stops working for one hirer and begins working for another. Generally, such situations will be clear. A new hirer for this purpose must be a different legal entity.

Advice suggests that community schools, voluntary controlled schools, community special schools and maintained nursery schools do not have a separate 'legal identity'. An agency worker can move between these schools within the same local authority without stopping the clock on the qualifying period unless it is a substantively different role or there is a break of more than 6 weeks (which is not one which 'pauses' the clock or during which the clock continues to 'tick'). If the agency worker moves to a school where a different local authority is the hirer, the qualifying clock resets to zero.

Schools with a separate 'legal identity' include VA and Foundation schools and independent schools (including academies).

### **Substantively Different Role**

If there is a substantive change to a job role within the same hirer, the qualifying clock is reset to zero for the new role. However, for this to happen the work or duties which make up the whole or main part of a role must be substantively different.

A substantively different role is one that is completely new, different work. There has to be a genuine and real difference to

the role. It could be a combination of different skills or requiring new training; new equipment; pay rate; location; working hours; change in management.

## 12. Appendix B - Pro-forma Template to provide information to TWA

Form to be sent to the Temporary Worker Agency as soon as it is evident that the agency worker will complete 12 weeks in the same role with the same hirer

Agency	
Name of Agency Worker	
Reference Number	
Start date of assignment	
Duration of Assignment (if known)	
Date qualifying period of 12 weeks completed/due to be completed	
<b>Conditions of Service</b>	
Job Title	
Grade	
Hours per week	
Weeks per year	
Hourly Rate	
Spinal Column Point Range	
Spinal Column Point	
Annual Full-Time Salary	
Date Salary Increment Due	
Progression Criteria to be met for Salary Increment	
Overtime Payments	
Shift/unsocial hours allowance	
Risk payments for hazardous duties	
Annual Holiday Entitlement commensurate for Grade of post	

## 13. Appendix C - Pro-forma Template to record and monitor agency workers' assignments

Refer to pro-forma Excel template under Related Forms

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