DechertOnPoint

September 2011 / Special Alert

A legal update from Dechert's Employment Law Group

The Agency Workers Regulations 2010: In Force on 1 October 2011

The Agency Workers Regulations 2010 ("the Regulations") finally come into force on 1 October 2011, ensuring the UK's compliance with the European Temporary Agency Workers Directive 2008. In May, the Government published some non-statutory guidance on the Regulations ("the Guidance") which provided more detail on how it is envisaged that aspects of the Regulations will operate in practice. This Guidance provides some useful examples and explanations for employers who are grappling with the Regulations. This *DechertOnPoint* provides practical advice to employers on some key areas of the Regulations and the Guidance.

Overview

In November 2010 we reported on the detailed provisions of the Regulations (see "The Agency Workers Regulations: What Employers Need to Know" available at http://www.dechert.com/The_Agency_Workers_Regulations_2010_What_Employers_Need_to_Know_11-01-20101/). In summary, the Regulations introduce the right, after a 12-week qualifying period, for agency workers to enjoy the same basic working conditions as if they had been employed directly by the hirer. In addition, agency workers will have the right to access information about vacancies and to use a hirer's facilities and amenities from day one of an assignment.

Scope

The Regulations are engaged where an individual is supplied by a "temporary work agency" ("TWA") to work temporarily for and under the supervision and direction of a "hirer". The Regulations therefore apply to the following:

- temporary agency workers;
- individuals or companies (whether private, public or third sector) involved in the supply of temporary agency workers; and
- hirers (again, whether private, public or third sector).

Temporary workers are workers who have a contract with a TWA which is either a contract of employment with the TWA or any other contract to perform work or services personally for the TWA. The Guidance indicates that those likely to fall outside the scope of the Regulations include:

- individuals who find work through a TWA but are in business on their own account (i.e., where there is a business relationship with the hirer who is a client or customer);
- individuals working through intermediaries where the worker does not work under the direction and supervision of the host organisation;
- individuals working for in-house temporary staffing banks (i.e., where an organisation employs its own temporary workers directly);
- individuals who become directly employed by an organisation via an "employment agency"; and

- individuals on secondment or loan from a different organisation.

However, the Guidance makes clear that an individual will not be out of scope of the Regulations merely because they work through an intermediary. For example, where an individual provides his or her services through an umbrella company but finds work through a TWA, any overarching employment contract the individual has with the umbrella company will not prevent the individual from benefitting from the Regulations.

Similarly, arrangements governed by a master vendor framework (typically where a lead recruiter fulfils a hirer's recruitment demands with other agencies acting as subsidiary suppliers as necessary) or a neutral vendor framework (typically where a lead recruiter manages the overall process of filling vacancies but will not itself supply temporary workers) will also be caught by the Regulations where agency workers are involved.

Impact Assessment

If hirers have not already done so, time has almost run out for them to undertake an impact assessment on the effect the Regulations will have (including the cost of compliance) on their business before the Regulations come into force. However, as not all of the rights are applicable from day one, there is still time for hirers to weigh up the consequences of the Regulations before agency workers accrue the right to equal working and employment conditions after 12 weeks on an assignment.

Day One Right to Use Facilities and Amenities

As of 1 October 2011, the hirer is responsible for ensuring that agency workers can access collective facilities and can view information from **day one** of their assignment.

The Guidance emphasises that the access to facilities requirement applies to facilities provided to comparable staff. There is no exhaustive list of prescribed facilities, but the following gives an indication of the kind of facilities which may be relevant: canteens, creches, shower facilities, common rooms, prayer rooms, vending machines and car parking facilities. While facilities like these will usually be located on site, if, for example, a canteen on a different site is used by staff, then this will also need to be made available to agency workers.

However, the Guidance makes clear that agency workers are not entitled to "enhanced" access rights. For example, if a creche has a waiting list, then the agency worker will need to join it: he or she does not have an automatic right to use a facility. Also, benefits in kind provided off site which are not provided by the hirer (e.g., subsidised access to an off site gym) as part of a benefit package to reward long term service and loyalty will not necessarily need to be made available to agency workers.

Furthermore, less favourable treatment of agency workers may in certain narrow circumstances be permissible, i.e., where there is an objective justification for the treatment. This is the only element of the Regulations which is tempered by the objective justification "excuse" for less favourable treatment. Essentially, hirers must ask themselves if they have a good reason for treating an agency worker less favourably than a direct hire in this regard. Importantly, however, the Guidance suggests that hirers are unlikely to be able to rely on the cost of facilities or amenities in question alone. Hirers are likely therefore to need to demonstrate that cost plus some other factor or factors gives rise to an objective justification for treating an agency worker less favourably.

Finally, an agency worker will also be entitled to receive information on the hirer's job vacancies. The entitlement is to the same information given to a directly employed worker based in the same establishment. The hirer can choose how to publicise such vacancies (for example, on notice boards or intranets) but should ensure that the agency worker can access this information.

Provision of Information: Day One Entitlements

Day one entitlements are the responsibility of the hirer. However, the Guidance indicates that it will be good practice for the hirer to inform the TWA of the facilities and how vacancies are advertised to workers in advance of the assignment. The most straightforward way of doing this may be for hirers to ensure that employee handbooks or individual policies are up to date as information about access to facilities will likely be set out in these documents. The hirer could then hand this information to the TWA in advance. Alternatively, hirers may prefer to hand the relevant information to the agency workers

direct as part of an induction at the start of an assignment.

If a hirer fails to provide this information an agency worker has the right to formally request it and to receive a response within 28 days. If a hirer does not do so, a tribunal can draw an adverse inference.

Relevant Terms and Conditions: Calculating the 12-week Qualifying Period

It is important that hirers understand that the Regulations are **not** retrospective. Agency workers who are carrying out an assignment when the Regulations come into effect will begin their 12-week qualifying period on 1 October 2011: no credit is given for work undertaken before this date. This means that the earliest date an agency worker could qualify for equal treatment with permanent workers will be 24 December 2011.

Detailed rules govern when the qualifying clock resets to zero, 'pauses' and continues to tick. For an overview of these rules, please see our November 2010 *DechertOnPoint* available at http://www.dechert.com/The_Agency_Workers_Regulations_2010_What_Employers_Need_to_Know_11-01-20101/. Hirers should note that, even if the agency worker is on assignment for only a couple of hours a week, this still counts as a week for the purposes of the Regulations and he or she will be entitled to equal treatment after 12 calendar weeks have elapsed.

Who is a ''Comparable'' Worker for the Purposes of Establishing Equal Treatment?

In most cases equal treatment can be established by giving the agency worker the same relevant entitlements "as if" he or she had been directly recruited by the hirer to do the same job. The equal treatment right concerns basic working and employment conditions which apply generally when the hirer recruits workers to do a job either because they have been set out formally, for example, in a standard employment contract, or apply as a matter of course.

An employer will be deemed to have complied with the Regulations if it can point to an actual comparator (who must be an employee) working under the same relevant terms and conditions as the agency worker and those terms and conditions are ordinarily included in workers' contracts.

However, the Guidance makes clear that it is not necessary to look for a comparator and acknowledges that there may be situations where it is not possible to point to one, for example, where employees are all engaged on different terms as a result of individual negotiation.

If an agency worker is a unique hire and there is no comparator, he or she will be entitled to relevant basic working and employment conditions which "apply generally" in the workplace. An employee cannot be used as a comparator once their employment has ceased.

The Guidance suggests that in the event of a dispute it will be for the hirer to show that a particular provision is applied to directly recruited staff. Consequently, creating an artificial "starter grade" with reduced rights just for agency workers would not be compliant.

Equal Treatment – What is the Effect on Appraisals and Bonuses?

Bonuses and commission payments directly attributable to the to the amount or quality of the work done by an individual will fall within the scope of "pay" for the purposes of the Regulations and therefore be subject to the equal treatment principle. Examples given by the Guidance of bonus payments which would fall within scope of the Regulations include commission payments linked to sales, bonuses paid to all staff who meet individual performance targets, bonuses paid to all staff who meet company standards or values, and bonuses payable on the basis of individual performance over a given period.

To comply with the Regulations, bonuses should be paid to agency workers according to the same criteria as to directly recruited employees. This means that a hirer may have to consider some form of appraisal system for agency workers. The Guidance suggests that it may be appropriate for a hirer to modify its own appraisal process so as to include shorter appraisals for agency workers. The Guidance also suggests that integrating an agency worker into the hirer's existing appraisal structure need not affect the agency worker's employment status, but many hirers may nevertheless be wary of integrating an agency worker in this way without careful consideration of how this is done.

Alternative approaches the Guidance suggests include:

- creating a simpler system to appraise agency workers based on their specific assignment objectives;
- using a TWA's existing appraisal system to keep track of the agency worker's performance through regular discussion between the hirer and the agency; and
- where no formal appraisal has taken place, asking the agency worker's line manager whether the agency worker should be paid any additional sum if their performance was exceptional or well above normal requirements.

Where a bonus payment to a directly recruited employee would reflect performance over a period exceeding an agency worker's assignment, the agency worker will be entitled to the same payment a directly recruited employee employed for the same period would have received. This may be a pro-rated payment. However, any relevant criteria that need to be met before payment is made to a directly hired workers are applicable to an agency worker too. So, if it is a necessary requirement of eligibility for a bonus that an individual remain in employment on a certain date for payment to be due, this condition would also apply to an agency worker.

However, hirers should be aware that where eligibility for a bonus follows an eligibility period, the eligibility period is counted from the start of the assignment (and not from 12 weeks in).

Working Time and Holiday Entitlements

Where a hirer offers more generous working time and holiday entitlements than the statutory minimum, an agency worker will also be entitled to this more generous treatment once the qualifying period has elapsed.

However, in respect of paid holiday entitlement in excess of the statutory minimum, that payment can, with the agency worker's agreement, be rolled up into his or her hourly rate or paid as a one off lump sum payment in lieu at the end of the assignment.

Alternatives to Agency Workers

Hirers may decide that the impact of the Regulations can be accepted or managed satisfactorily. However, hirers who no longer view agency workers as a sufficiently flexible or commercially desirable option may wish to consider some of the following alternative arrangements:

- **In-house temporary staffing banks.** If a hirer cuts out the TWA and creates its own in-house pool of temporary workers, the arrangement will fall outside of the scope of the Regulations and the hirer would be free to hire from this pool at will. This is because the temporary workers would be employed directly by the hirer and not a TWA.

  However, groups of companies should take care not to inadvertently trigger the Regulations by "sharing" employees within the group. Where a company (A) employs a temporary worker, but the worker in fact works for another group entity (B), A is likely to be acting as a TWA and the arrangement will be in scope of the Regulations.

- **Master services contracts.** Hirers may wish to outsource a particular function (catering and cleaning are common examples) to a master services contractor rather than continue to rely on agency workers performing the roles (although this may present cost and TUPE issues).

- **Secondees.** Use of secondees on particular projects may assist some hirers to reduce reliance on agency workers, although it may be unlikely to be able to satisfy a rolling demand for large numbers of individuals. Furthermore, hirers should be wary of inadvertently being deemed the secondee's employer as a result of directly managing him or her.

- **Genuinely in business on own account.** Hirers should be aware that simply putting earnings through a limited company will not of itself put individuals beyond the possible scope of the Regulations. However, engaging an individual or contractor who is genuinely in business on his own account (i.e., there is a customer-business relationship) will fall outside the scope of the Regulations.

- **re-negotiation of framework agreements for the supply of agency workers.** Hirers might consider approaching their TWA with a view to renegotiating the terms of the deal in light of the likely increased cost of the service to the hirer.

- **the "Swedish Derogation".** Put simply, the Swedish Derogation means that the Regulations' rights to equal pay of an agency worker no longer exist when agency

workers are employed on a permanent basis by their umbrella company or temporary work agency and receive pay in-between assignments.

However, the agency worker needs to be permanently and genuinely employed by the umbrella company or agency, and the contract must have been entered into before the beginning of the worker's first assignment. Also, there are various other considerations which apply in relation to the Swedish derogation and, as all the other conditions prescribed by the Regulations (such as holiday entitlement, working conditions and access to vacancies and facilities) must still be complied with, this option is unlikely to be used extensively by hirers.

- **Employ individuals direct.** Some hirers may consider that, for potentially longer term assignments, it might be more straightforward to hire an employee direct rather than engage him or her as an agency worker. Care should, however, be taken before dismissing such an individual as, even without a year's service, he or she will benefit from statutory protections such as protection from unlawful discrimination and certain forms of unlawful detriment.

Conclusions

As the 12-week qualifying period approaches, employers now need to analyse carefully, if they have not done so already, the extent to which their contractors may be caught by the Regulations and consequently how they may need to adapt their hiring policies, appraisal systems and arrangements for dealing with third party suppliers of staff to ensure compliance with the Regulations, especially given the financial penalties which can result from breach of the Regulations.

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