

## *The EU Temporary Agency Workers Directive: The End of Agency Workers?*

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The Temporary Agency Workers Directive 2008/104 (the "Directive") was published in the Official Journal of the European Union on 5 December, 2008, and Member States have until 5 December 2011 to implement it. Last week, the UK Department of Business Innovation & Skills ("BIS") published a consultation document on the Directive that included draft Regulations.

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### TABLE OF CONTENTS

1. Background/Current Use of Agency Workers .....	1
2. Who Will Be Covered?.....	2
3. Equal Treatment .....	2
4. Employment Vacancies .....	2
5. Temporary to Permanent Fees .....	2
6. Informing Worker Representatives .....	3
7. Who Will Be Liable?.....	3
8. Future of Agency Workers .....	3

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### 1. Background/Current Use of Agency Workers

Agency workers are individuals who are employed or engaged by an employment business to work for the employment business's clients. The benefits of hiring agency workers include: headcount flexibility; ease of filling short-term roles; no employment law exposure; and administrative simplicity (for example, agency workers will generally not participate in the client's pension and benefit plans).

The Directive was introduced to improve the rights of agency workers by requiring clients to give them the same basic employment conditions as the client's own employees, including those governing the duration of working time, holidays and pay. The Directive allows for a qualifying period before this equal treatment is applicable; in the UK, the Confederation of British Industry and the Trades Union Congress agreed that equal treatment rights would not be triggered until after 12 weeks in a given job, regardless of the individual's working hours.

## 2. Who Will Be Covered?

The new Regulations will apply to any person finding temporary work through an employment business. The definition of agency worker will exclude workers who are genuinely self-employed, working through their own limited liability company or those employed on “**Managed Service Contracts**” (i.e., a contract to provide a specific service for a client, where the client pays for the end product and the worker remains under the control of the agency or employment business).

However, the definition will extend to workers who provide work for a client but are employed by “umbrella companies”, those who operate their own personal service company but are not genuinely self-employed, and those who are employed through any intermediary company or “chain” arrangement. The Government’s concern is that excluding such arrangements might enable unscrupulous companies to avoid the Regulations.

## 3. Equal Treatment

Agency workers will be entitled to the same “**Basic Employment Conditions**” as the client’s permanent employees after 12 weeks of service for the client. Basic Employment Conditions include conditions relating to: working time; overtime; breaks; rest periods; night work; holidays; and pay.

The Government is proposing that “pay” will include salary and some bonuses relating to personal and individual performance. It would not include benefits such as share schemes or company car allowances. Nor will agency workers be entitled to join the client’s pension schemes (although from 2012 and under the Pensions Act 2008, some agency workers will be entitled to a workplace pension saving with an employer contribution).

Agency workers will also be given access to the client’s amenities or collective facilities; in particular, canteen, child-care facilities, and transport services, etc. This right will apply from the start of the assignment (rather than after the 12-week qualifying period) and the Government proposes that responsibility for complying with this obligation will rest solely with the end-user company.

## 4. Employment Vacancies

Importantly, clients will be required to provide agency workers with details of vacant positions and to give them the same opportunity as the client’s other workers to apply.

This right applies from the start of an assignment and is not subject to the 12-week qualifying period. It is likely that clients will have to:

- display lists of vacancies where all employees and agency workers would reasonably be expected to see them (e.g., a notice board, website/Internet site);
- ensure agency workers are included on circulation lists where vacancy lists are e-mailed to all other members of staff; and
- ensure agency workers are told of the client’s recruitment arrangements when they commence their assignments, including how often vacancies would normally be advertised and what the typical deadlines for applying are.

## 5. Temporary to Permanent Fees

Under Regulation 10 of the Conduct of Employment Agencies and Employment Business Regulations 2003 (the “Conduct Regulations”), employment businesses can charge their clients a

“transfer fee” where a client wishes to directly employ an agency worker, or where the client introduces the agency worker to a third party who hires the worker directly.

The Government’s response is to introduce a requirement in the Regulations that such transfer fees must be no more than reasonable. Any extended period of hire that is arranged as an alternative to paying a transfer fee must also be reasonable. This will require a corresponding amendment to be made to the Conduct Regulations.

## 6. Informing Worker Representatives

Where there is an existing legal obligation to provide information to workers’ representatives on the employment situation, clients must now also provide “suitable information” on the use of agency workers. The Regulations will therefore amend relevant UK legislation containing information and consultation provisions, including the Information and Consultation of Employees Regulations 2004, the Transfer of Undertakings (Protection of Employment) Regulations 2006, s. 188 of the Trade Union and Labour Relations (Consolidation) Act 1992, etc. “**Suitable information**” will likely be defined as:

- the total number of agency workers employed by the client;
- the areas of the business in which they are employed; and
- the type of work they are contracted to undertake.

## 7. Who Will Be Liable?

The agency will be primarily liable for ensuring that the equal treatment rule is complied with. However, the agency will have to rely on information provided by the client, so it is proposed that there will be a defence of having taken reasonable steps to obtain accurate and relevant information from the client regarding an agency worker’s equal treatment package. The client will be liable if it has provided inaccurate or incomplete information.

## 8. Future of Agency Workers

Hiring agency workers can often be expensive; the proposed changes will in most cases further increase the cost to businesses that currently make use of agency workers. Additionally employers will have the burden of providing agency workers with access to onsite facilities and job vacancies and will face liability for any failure to do so. These developments, coupled with the recent withdrawal of HM Revenue & Custom’s VAT exemption (with the effect that agencies now have to charge their clients VAT on salary and other payments provided to agency workers), may mean that hiring agency workers becomes a significantly less attractive solution for businesses in the future.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:*

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