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Agency Workers Regulations – Changes are coming…

As we have reported previously, The Agency Workers Regulations 2010 ("AWR") are changing significantly in April 2020. From 6 April 2020, Regulation 10 (and consequential regulations) will be repealed.

In summary, where agency workers are employed under contracts that satisfy Regulation 10 AWR (AKA 'Swedish Derogation' or 'pay between assignments' contracts) those workers will not qualify for parity pay under Regulation 5 AWR. The current quid pro quo, for the agency worker not having a right to parity pay, is that among other things they have a right to pay between assignments.

Once enacted, the Regs will have the effect of entitling those that are currently not entitled to pay parity (because of Reg 10) to receive pay parity under Regulation 5 AWR. All new **qualifying** agency workers will also have a right to pay parity under Regulation 5 regardless of whether they are employed under contracts that would satisfy the outgoing Regulation 10. The consequential right to pay between assignments will also be repealed.

Given the scale of this change, there are many considerations for those that employ individuals under Regulation 10 contracts, not least the fact that they are employees and therefore entitled to full employment rights. This could mean navigating unfair dismissal rights. If you require further assistance get in touch with Mark Taylor. For the remainder of this newsletter, in light of the repeal of Regulation 10 many will be considering new engagement options and therefore we will consider the scope of the AWR, and, in particular, who qualifies for rights under the AWR.

Agency Worker

Whether the AWR applies, will, to a large extent, depend on whether the individual qualifies as an Agency Worker. The constituents of the definition of an Agency Worker (Regulation 3 (1)) for the purposes of the AWR are where an individual is:

1. supplied by a Temporary Work Agency ("TWA")
2. to work temporarily for and under the direction and supervision of a hirer
3. who has a contract with the Temporary Work Agency which is:
   a. a contract of employment with the agency, or
   b. an agreement with the agency to perform work or services personally
4. an individual is also prohibited from qualifying as an Agency Worker where they are a business or profession providing services to the agency and/or hirer as their client or customer.

The above constituents can, for the purposes of this newsletter, be broken down into two parts. Constituents 1 & 2 above concern the nature of the supply whereas constituents 3 & 4 focus on the relationship between the individual and the party supplying the individual. We will consider each grouping in turn.

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Nature of the supply (constituents 1 & 2)

In order to fall within the AWR there must be a TWA and the individual must be supplied by the TWA to the hirer to work **temporarily** under the direction and supervision of the hirer. Under the legislation a TWA (Regulation 4) is a person engaged in the economic activity of:

- ✓ supplying, either directly or indirectly, **temporary** agency workers to third party hirers, or
- ✓ paying for, or receiving or forwarding payment for, the services of those **temporary** agency workers when they work for a hirer.

It is clear from the legislation and subsequent case law that in order for a supply to fall within the AWR, it must be **temporary**. Where a supply is permanent then it will not fall within the AWR. The legislation is clear on this and it has also been considered by the Employment Appeal Tribunal ("EAT"). Two EAT cases have both confirmed the principle that where a supply is permanent it will not fall within the AWR. The case of *Moran v Ideal Cleaning Services Ltd and another* first looked at this issue and found that on those particular facts the supply was permanent (not temporary) and therefore did not fall within the AWR.

Interestingly, in *Moran*, one of the arguments (put forward on behalf of the claimant) that the EAT had to consider was whether excluding permanent supplies from the AWR was contrary to the purpose of the European Directive (that the AWR is supposed to give effect to) that was designed to protect all agency workers. In considering this, the EAT went back to the drafting and debates which led to the Directive. In doing so, they found that the original draft of the Directive did not contain the requirement that the supply be temporary. However, in later drafts (and in the final text), following debates the requirement for the supply to be temporary was inserted. This satisfied the EAT that the requirement for a supply to be temporary was enshrined in law and that where a supply is not temporary then it does not fall within the AWR.

In *Brooknight Guarding Limited v Mr A Matei* the EAT again ratified the principle that a permanent supply does not fall within the AWR. On the facts of that case the supply in question was not permanent but instead was temporary and therefore did fall within the AWR. What *Brooknight* highlighted was the fact that the nature of a supply (whether it is temporary or not) will depend on the facts of each particular case. In many cases a supply will be temporary, after all that is why many clients use employment businesses in the first place. They have temporary labour supply needs that require a temporary solution. However, in some cases a supply will not be temporary and in those cases the AWR will not apply.

Relationship between the individual and the supplier (constituents 3 & 4)

As stated, the other key element within the concept of an Agency Worker is the relationship between the individual and the party supplying them. Does this relationship constitute one that means the individual qualifies as an Agency Worker?

In order to do so the relationship must be one where the individual is personally obliged to provide their own work or services and not one where they are a business or profession providing services to a client or customer. If these criteria seem familiar to you, it is because they are the same criteria necessary for an individual to qualify as a 'worker' and for the rights associated with that status, for example, holiday pay. This is a test that has been through the courts and tribunals on numerous occasions and our fact sheet on worker status can be found here.

Summary

With Regulation 10 AWR being abolished many will be considering what engagement/employment options best suit those affected. For some, this will be continued employment under the same terms but with the right to pay parity. For others, it will be a different form of engagement. The starting point of any decision on how to engage individuals should be to assess what legislation is applicable. This newsletter has set out, in general terms, the scope of the AWR. If you require more detailed advice on this, please contact Mark Taylor.