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Implementation of the Agency workers Directive - consultation response form and questions

This response form can be completed online at http://tinyurl.com/d5ybmb or hard copies posted to the address below

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Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate interest group on the consultation response form. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the box below that best describes you as a respondent to this consultation:

Micro business (up to 9 staff	
Small business (up to 50 staff)	
Medium business (50 to 250 staff)	
Large business (over 250 staff)	
Business representative organisation/trade body	
Trade Union or staff association	
Social enterprise	
Local government	
Legal representative	Committee of legal representatives
Central government	
Individual	
Charity or social enterprise	
Other (please describe)	

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Responses to questions raised in consultation document

Scope of the Directive – who is covered, definition of "agency worker"

1. We propose that implementation should apply to people finding temporary work through an "employment business", (not an "employment agency); that we base the scope of the legislation on the definition of "worker" used in the Working Time Regulations 1988, but adjust this to include agency workers contracted to an "umbrella company". This would exclude workers who are genuinely self-employed, agency workers working through their own limited companies, and agency workers employed on "Managed Service Contracts".

Q1 Do you agree that implementation should cover workers placed on temporary assignments by "employment businesses" but not those placed permanently by "employment agencies"?

Yes ~~No~~

Please comment

The legislation needs to make clear that a worker who moves from temporary to permanent status ceases to be covered by the legislation. Otherwise the worker would be covered by both regimes (i.e. this law and normal employment protection laws) and that would create conflict and uncertainty.

Q2 Do you consider that using a definition for agency workers based on that of a "worker" under Regulation 2 of the Working Time Regulations 1988, but in the context of the triangular relationship with the employment business and the hirer, provides the most appropriate coverage for the legislation to implement the Directive ?

Yes ~~No~~

Please comment

We recognise that it is likely to be the most appropriate definition, given that it ensures consistency with key rights such as those under the Working Time Regulations. However, we do not consider the definition of "worker" is clear and well defined in statute or case law. As a general matter we consider guidance will be helpful. However guidance cannot be a substitute for legislation. It is imperative that the legislation itself is clear as to the relationships that are either within or outwith the legislation. For example legislating that "umbrella companies" are in scope and "personal service companies" are out of scope is insufficient because some relationships could be described as either. The legislation must be precise on

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such concepts. It is not satisfactory to leave this to guidance. There are many examples of the Courts ignoring "official guidance" and looking solely to the words of the statute to determine the Court's view of what Parliament intended (see for a recent example the case of SCA Packaging Limited v Boyle [2009] UKHL 37). In short Parliament's policy decisions should be reflected in the words of the statute, not guidance.

It needs to be made clear that a person cannot at the same time be a worker for the employment business and a hirer. This would be possible by adopting an unrefined definition of "worker". For example, an agency worker could be an employee of the employment business (limb (a) of "worker") and a party to a contract to the hirer for the supply of his labour (limb (b) of "worker") making him qualify as a "worker" for both employment business and hirer .It is particularly important to exclude seconded workers who typically remain employed by company A but are party to a contract with company B (the secondee company) where company A and company B are respectively wholly owned subsidiary and parent (or vice versa).

Para 3.2 of the consultation document states that an agency worker would need to do the work personally and not send a substitute. The drafting of the agency worker definition should make clear the need for personal service on the part of putative agency workers in order to avoid those who are workers (and not employees) principally or partially because of the right of substitution, falling within the scope of the agency worker definition unintentionally.

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Q3 Should the definition include those agency workers working through an "umbrella company", but who find work via an employment business?

~~Yes~~ No

Please comment

Personal service companies are excluded from scope. Under an umbrella company arrangement, services are provided by a corporate vehicle, so we think umbrella companies and their employees should also be excluded from scope.

Q4 Should the definition exclude the self-employed, Limited Company Contractors and those working on managed service contracts?

Yes ~~No~~

Please comment

These are not "workers" within the meaning of Article 3.1 (a) of the Directive.

Q5 Do you think that there are likely to be consequences of using the proposed definition which the government should take into account? If so, please comment.

Yes ~~No~~

Please comment

As above at Q1, we do not consider the definition of "worker" to be sufficiently clear.

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Working Time and holiday entitlements

2. We consider that the implementation of the Directive as regards equal treatment on the duration of working time, and paid holiday entitlement, entails providing agency workers remaining in a given job for more than 12 weeks should have the same entitlement to rest time and leave as a permanent employee, if such entitlements are more generous than the statutory minimum requirements.

Q6 Do you agree with our proposed approach to implementation of the Directive's requirements in respect of working time and holiday entitlements?

Yes ~~No~~

Please comment

Yes, subject to our response to Q7.

Q7 In particular, do you see benefit in our suggested approach to simplifying the administration of entitlement to leave entitlements above the statutory minimum?

Yes ~~No~~

Please comment

We believe that the calculation of rolled-up holiday pay for additional annual leave would be complex, so we favour a lump sum payment mechanism.

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Q8 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

Yes No

Please comment

Pay

3. We propose that the definition of pay, for the purposes of our implementation, should be basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. This would include payment for overtime, shift allowances, unsocial hours premiums/bonuses, and bonuses where they relate directly to personal and individual performance, but exclude aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing schemes.

Q9 Do you agree with our proposed approach to the definition of "pay" for the purposes of the Directive?

~~Yes~~ No

Please comment

We propose that the definition of pay should be basic pay only because: - including other contractual entitlements becomes extremely complex. For example, we consider the bonus example on Page 24 of the consultation paper to be unworkable; and - if there is any doubt on what "pay" means under the Directive the Government should make use of the derogation in Article 5.4 and, to ensure certainty, pay should be defined in the same way as it is defined domestically for redundancy pay and other purposes i.e. under the ERA 1996 Part XIII Chapter II provisions. - there is a strong consensus among respondents to a survey of clients that agency workers should not be entitled to the contractual benefits (such as bonuses and overtime) afforded to permanent employees.

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Q10 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

Yes ~~No~~

Please comment

If contrary to our view "pay" is defined beyond base pay, where an agency worker receives more base pay than a relevant permanent employee in the same job, the excess should count towards determining whether equal treatment has been provided. For example, if an agency worker is paid £100 a week and the relevant permanent employee in the same job is paid £90 per week as base pay and £10 as bonus that should count as equal treatment. Otherwise the agency worker is receiving more favourable treatment. If that happens it is not inconceivable that the permanent employee would then be entitled by law to an uplift.

Q11 Specifically, in the light of the Pensions Act 2008, are you aware of any particular areas of concern regarding agency workers? If so, please give details.

Yes No

Please comment

Defining the 12 –week qualifying period

4. We propose that the 12-week qualifying period should be 12 calendar weeks, regardless of the working pattern (e.g. part-time as opposed to full-time). We propose that a new qualifying period will begin only if a new assignment with the same employer is substantially different.

Q12 Do you agree that the 12 week qualifying period should simply be 12 calendar weeks, no matter the number of hours or days worked during that period?

Yes ~~No~~

Please comment

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Breaks between assignments

5. We invite views on the minimum duration of a break between assignments before the 12 weeks clock should start again.

Q13 Do you agree that there should be a minimum break between assignments before the "12 week" clock should start again rather than a 'reference period'? If yes, how long should the minimum break period be?

~~Yes~~ No

Please comment

We recommend that the continuity of employment rules, which are clearly understood by employers and workers alike, and well defined in case law, should be used. This would allow continuity where a worker is absent due to sickness, but would deem continuation of work if the individual was sent away by the company in an attempt to restart the 12 week clock.

Any calculation based on a reference period could involve an undue administrative burden for businesses.

Change of responsibilities during an assignment

Q14 Do you agree with the approach we have outlined to the question of whether a change in responsibilities entails the commencement of a new assignment?

Yes No

Please comment

We agree with the principle of the approach but we think that the criteria for assessment need to be defined more clearly. Furthermore, we think assessment should focus on the individual's actual roles and responsibilities, and not the label applied to the role by the parties.

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Q15 Are there other factors that our implementation on this point needs to bear in mind, including to reduce scope for circumvention of the Directive's objectives?

Yes No

Please comment

Permanent contracts of employment and payment between assignments – possible exemption from principle of equal treatment

6. We invite views on the approach to take regarding the flexibility available under the Directive to permit alternative arrangements for agency workers on permanent contracts of employment who are paid between assignments

Q16 Do you agree that it would be helpful to make use of this derogation when implementing the Directive?

Yes ~~No~~

Please comment

Q17 To what extent would you expect implementation of this exemption to impact on current practice in the agency sector?

Please comment

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Q18 Were the exemption to be implemented, what is your view regarding the level of pay that should be required between assignments? How long should an agency employing a worker on this basis be required to retain that worker after the end of the assignment concerned?

Please comment

Pay should be the national minimum wage and post assignment employment should be 1 week-to reflect the minimum statutory period of notice.

Agreements between workers' and employers' representatives

7. We invite views on the role that collective or workplace agreements might play in implementing the Directive.

Q19 Do you have any views on the role that collective or workplace agreements might play in implementing the Directive, taking account of the need to provide the appropriate level of protection as set out in the Directive and the TUC and CBI agreement? If so, please provide details

~~Yes~~ No

Please comment

Pregnant women and new mothers

8. We invite views on compliance with the Directive's provisions concerning pregnant women and new mothers.

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Q20 Do you consider the extension of the provisions described in paragraph 4.40 appropriate for protecting the health and safety of agency workers who are pregnant or new mothers?

Yes ~~No~~

Please comment

It should be made clear that this obligation falls on the employment business.

Q21 Is the length or expected length of the placement the appropriate period during which a woman should continue to be offered alternative work or suspended on full pay as a result of a health and safety risk?

~~Yes~~ No

Please comment

This would be uncertain if a placement is open-ended.

Access to employment, collective facilities and vocational training

9. We invite views on the Directive's provisions regarding access to employment, collective facilities and vocational training, including the possible implications for our current legislation on "temp to perm" fees.

Q22 Do you consider that our proposals will meet the requirements of Article 6.1?

Yes No

Please comment

The Directive states: "…Such information may be provided by a general announcement in a suitable place in the undertaking…". Many hirers may have confidentiality issues regarding IT/facility access for agency workers. We recommend that the requirements on hirers should remain general, in keeping with the Directive, leaving the method of implementation of this requirement to the hirers.

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Q23 Do you think our proposals (in question 22) will properly include the interests of agency workers who are on short-term assignments or who are often away from the hirer's premises, eg drivers or those working in satellite sites?

Yes No

Please comment

See comments at Q22.

Temporary to permanent status

Q24 Do you consider that the existing legislative provisions are consistent with the requirements of the Directive in respect of prohibiting agency workers from taking up permanent employment with the hirer?

Yes ~~No~~

Please comment

We do not think an adjustment to existing legislation is required, except as mentioned in our reply to Q25.

Q25 Were it to be necessary to adjust the current legislation to make specific provision on the question of a '<u>reasonable</u> level of recompense', do you have views as to how the provision should be framed? In particular, should legislation or guidance seek to address the question of how the level of the 'reasonable recompense' should be calculated?

Yes ~~No~~

Please comment

We assume that, at the time the drafting of the Directive was considered by the UK Government, it must have formed a view on what was meant by this

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term.

Ideally, as remarked in our reply to Q2 above, we recommend that the legislation be more explicit on what is reasonable e.g. reasonableness is tested by the service provided by the employment business rather than merely providing guidance.

Access to onsite facilities for agency workers

Q26 Do you agree with the proposed approach (5.14 – 5.16) regarding implementation of the Directive's provision on access to onsite facilities?

Yes ~~No~~

Please comment

However, we would recommend that these provisions should include further detail, such as conditions regarding eligibility and level of benefit (i.e.. benefits equal to permanent employees in comparable role grades within the hirer organisation).

Access to training

Q27 Are there further steps that could be taken to help "employment businesses" and hirers use Government initiatives to promote training for agency workers?

Yes No

Please comment

To avoid "gold plating" the Directive, access should be to "amenities or collective facilities". We agree that the objective justification exception should apply.

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Thresholds for bodies representing workers

10. We invite views on our proposals for implementing the Directive's provisions for calculating the threshold above which bodies representing workers are to be formed, in particular on whether the threshold should apply to the agency or the hirer.

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Q28 Have we identified the relevant thresholds under UK law to which Article 7 applies?

Yes ~~No~~

Please comment

Q29 Do you agree that temporary agency workers should count towards the thresholds applicable to the temporary-work agency rather than those applicable to the hirer?

Yes ~~No~~

Please comment

It is not appropriate for agency workers to be counted twice. Thus, they either count for the employment business or the hirer. We consider it should be the hirer because by definition they are not employed by the hirer and they are temporary. It would be perverse for an agency worker assigned for only a few hours to cover a permanent employee's right to emergency time off to take a sick child to a doctor (Section 57A Employment Rights Act 1996) to trigger a prolonged process such as the trade union recognition procedure.

Q30 Do you have other comments on the way this Article should be transposed?

~~Yes~~ No

Please comment

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Information to workers' representatives

11. We invite views on complying with the Directive's requirements concerning hirer's obligations to provide suitable information on the use of agency workers when providing information on the employment situation to bodies representing workers.

Q31 Does the list under paragraph 7.2 identify the relevant regulations which establish a direct or indirect requirement to provide information on the employment situation?

Yes ~~No~~

Please comment

Q32 Do you agree with our interpretation of the legal effect of Article 8 of the Directive (paragraph 7.3)?

Yes No

Please comment

The Directive requires "suitable" information to be provided. We believe that your suggested implementation goes beyond the Directive's requirement. For example, it seeks to incorporate the requirement into collective forums, where it would be more appropriate for them to be treated as individual rights e.g. Health & Safety information regarding agency workers. We do not agree that the Directive requires information to be given to employees directly. The Directive in Article 7.2 says "bodies representing workers". This does not say "employees" or "workers".

Q33 Do you agree that it would be preferable to define the meaning of the term 'suitable information' in our implementation (paragraphs 6.4-6.5 above)?

~~Yes~~ No

Please comment

We do not agree with your interpretation in paragraph 7.5. The Directive interprets "suitable information" by reference to the type of information the employer is required by law to supply to the bodies representing workers. In

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other words what is "suitable information" is conditioned by the nature of the employer's relevant obligation to the body representing workers. It follows that what is "suitable information" in one situation is not so in another. The interpretation in paragraph 7.5 gives a "one size fits all" approach, which we do not think is correct.

Establishing "equal treatment"

12. In order to establish that an agency worker has not received equal treatment, it will be necessary to identify the "given job". (ie the job occupied by the agency worker).

Q34 Do you agree with the approach to defining the limits of a "given job"?

~~Yes~~ No

Please comment

The legislation should reflect the Directive. For example, the reference in paragraph 8.7 to "broadly similar work" is not consistent with the Directive. The Directive refers to the same job, not "broadly similar work".

Subject to our general caveat mentioned in our response to Q2 above, and our foregoing point, we agree guidance would be helpful.

Q35 Are there any particular considerations we should bear in mind regarding the preparation of the Regulations on this point, or factors you would like to see reflected in the guidance concerned?

Yes No

Please comment

Determining equal treatment

13 We consider that the key factor in establishing "equal treatment" for an agency worker will in practice be comparison with a comparable worker doing

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broadly similar work in the same organisation. The wording of the Directive does not, however, rule out other factors being brought to bear and we would envisage making it clear, perhaps in our accompanying guidance, the circumstances in which other factors might be relevant in the absence of a comparable worker.

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Q36 Do you agree with our proposed approach on the question of determining equal treatment within the context of the Directive's requirements? Are there additional factors that you consider should be taken into account?

~~Yes~~ No

Please comment

We would recommend using the wording of the Directive in UK legislation and providing guidance on this requirement.

In relation to the guidance envisaged in paragraphs 8.7 and 8.8 of the consultation paper, we are particularly concerned about:

1. the use of the ambiguous term "broadly similar";
2. consideration of equal pay; and
3. the suggestion that a comparison could be made between employees in different companies.

Liability

14. We propose that primary liability will for compliance with obligations under the Directive rest with the agency, whilst acknowledging that the agency will inevitably be reliant on information from the hirer. We suggest that agencies should have a reliable defence in the event that they had taken ""reasonable steps" or "best endeavours" to obtain information from the hirer, who would become liable if it became clear that information provided was inaccurate or incomplete. We propose not to make specific provision regarding the nature of the information that should pass from hirer to agency, but to give agency workers the ability to ask their agency for information relating to their equal treatment rights under the Directive.

Q37 Do you agree with our proposed approach to liability?

Yes ~~No~~

Please comment

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Q38 Are there any additional factors that you would wish to see addressed in guidance accompanying the implementing Regulations?

Yes No

Please comment

Confidentiality issues should be taken into account. For example, two employees may ostensibly perform the same role but justifiably be paid differently for it, due to differences in certain aspects of their roles and abilities. The hirer should be able to protect the anonymity of this information.

Information on equal treatment for workers

Q39 Do you agree that the approach described in paragraph 8.15 is appropriate for ensuring that agency workers have access to information on equal treatment ?

Yes ~~No~~

Please comment

We think a period of 21 days is too short bearing in mind that the employment business may need to contact the hirer for more information. 28 days is more realistic.

Q40 Do you consider that a template for information provision to workers could be of assistance?

Yes ~~No~~

Please comment

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Q41 Could existing regulations on the provision of information to work-seekers be further simplified in the context of our implementation to reduce the administrative burden on the recruitment industry whilst ensuring that protection for workers and employers remains in place ? If so how?

Yes No

Please comment

Dispute resolution and Employment Tribunals

15. On dispute resolution, we propose that an agency worker's first port of call should be the temporary work agency; we are also discussing with Acas how they might become involved in helping to resolve disputes and claims, such as pre-claim and post-claim conciliation. Where complaints cannot be resolved in this way, and we intend to enable agency workers should be able to pursue a claim through Employment Tribunals.

Q42 Do you agree with our proposed approach to dispute resolution? In particular, do you agree that the agency concerned should be the first point of contact for an aggrieved agency worker?

Yes ~~No~~

Please comment

Our clients who are hirers have expressed concern over the resources wasted in dealing with Tribunal claims where the employment business and the hirer have both been named as respondents but only one can be liable. Under the new law it will be clearer as to who is the relevant respondent. Therefore you should legislate (and encourage) Employment Tribunals to expeditiously remove hirers from proceedings, especially where the employment business's defence does not suggest the hirer is responsible.

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Review of restrictions and prohibitions on use of temporary agency workers

16. We invite views on complying with the Directive's requirement to review any restrictions and prohibitions on the use of agency work.

Q43 Do you agree with our view that there are no restrictions in UK legislation that would need review in the context of Article 4? If not, which provisions do you think require consideration?

Yes No

Please comment

Reducing administrative burdens/regulatory costs

17. We will be setting up a working group to consider how administrative burdens surrounding the use of agency workers, partly in relation to the Directive, but also more generally, to see if there is any scope for further simplification.

Q44 Which areas do think the working group should focus on?

Please comment

Entry into force

18. All Member States are required to adopt the necessary laws to implement the Directive by 5 December 2011. We have received a number of representations to the effect that the entry into force of the regulations should be delayed in order for all concerned to adjust to their requirements, particularly during difficult economic times. We are also aware, however, that others would wish to see earlier entry into force in order to enable agency workers to derive benefit from the Directive from an earlier point

Q45 When do you consider the regulations should come into force and why?

Please comment

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October 2011. This will conform to the UK's typical legislative timetable, ensure that businesses have time to prepare for forthcoming changes, and allow businesses to take advantage of the forecast upturn in market conditions.

Other areas

19. We consider that we have identified the key issues that need to be addressed in this Consultation Paper. However we would welcome your views on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions.

Please comment on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions

A 21 day period is too short for hirers to source detailed equality information, process it to ensure that it is relevant and complies with the Data Protection Act, then provide it to an agency worker.

We do not intend to acknowledge receipt of individual responses unless you tick the box below:

☐ Please acknowledge this reply

We will publish all the responses received in this consultation unless you tick the box below

☐ Please treat my response as confidential

We would like to keep you informed of the progress of these proposals, including further consultation. If you wish to join the mailing list for further proposals please tick the box below

☐ Please add me to the mailing list for future updates

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