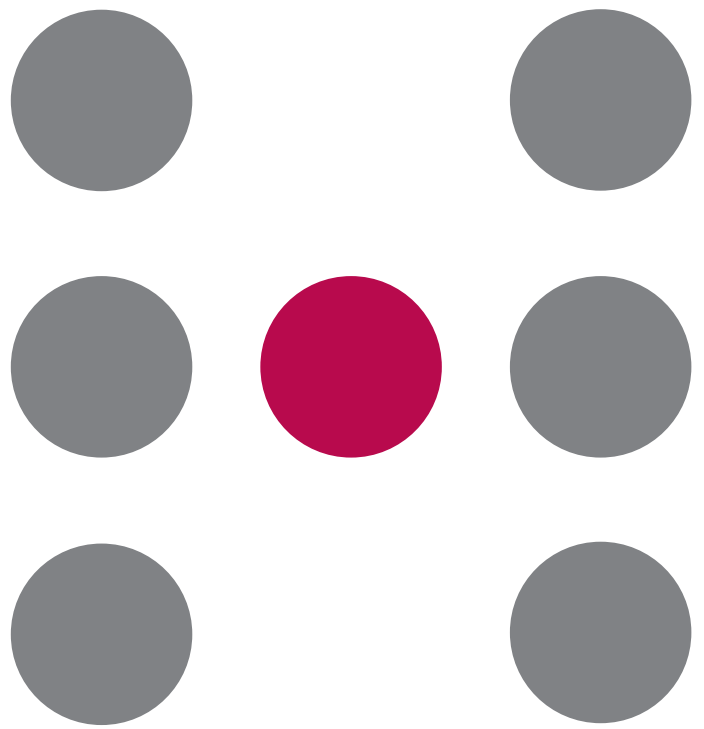


HIRING AGENCY WORKERS



A practical guide to the **Agency Workers Regulations 2010**

What the **Regulations** say

After a 12-week qualifying period, the Agency Workers Regulations 2010 give agency workers an entitlement to the same basic working and employment conditions that they would have enjoyed if hired to do the same or a similar job as under a contract of employment with the hirer – ie, as if they were directly employed by the hirer. The equal treatment principle applies to basic working and employment conditions but is limited to pay, duration of working time, length of night work, rest periods, rest breaks and annual leave.

Equal treatment for the purposes of pay does not extend to pensions, occupational sick pay, maternity, paternity and adoption leave, redundancy payments or financial participation schemes, such as profit share or share participation schemes.

Bonus payments will be covered by the equal treatment principle where they reflect work done (eg, piecework), where they are commission-type bonuses, or where they are based on an assessment of individual performance.

Bonuses that are entirely based on corporate performance are excluded from the equal treatment principle. It is not clear whether bonuses which are based on both individual and corporate performance will be covered, so care should be taken in this area.

Hirers should not, however, become involved in performance appraisals to determine the performance of agency workers as this may indicate an employment relationship.

Some rights apply from Day 1 – irrespective of the length of the assignment – and these are outlined later in this guide.

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Right to equal treatment – 12-week qualifying period

The qualifying period relates to an agency worker who has been engaged on the same assignment with the same hirer for a 12-week period and so has a right to equal treatment in respect of the relevant terms and employment conditions. Any week during the whole or part of which the agency worker works during an assignment is counted as a calendar week, even if, for example, the agency worker only works for one day during that week. (Time spent working before 1 October 2011 does not count.)

Unless the agency worker begins a “substantially different” role with the hirer, he/she must cease working for the hirer for at least six weeks in order to break continuity of engagement. However, the anti-avoidance provisions (see below) are likely to apply where a hirer repeatedly engages the same agency worker but structures assignments so that they never last more than 12 weeks and are routinely separated by at least six weeks.

There are special rules for sickness absences and maternity, childbirth and pregnancy-related absences. Essentially, the clock is “paused” for sickness absences of up to 28 weeks. If the break is related to pregnancy, childbirth or maternity and applies during a “protected period” or when the agency worker is on maternity, paternity or adoption leave, time continues to run.

The regulations stipulate as “relevant terms and employment conditions”:

- *pay;*
- *duration of working time;*
- *length of night work;*
- *rest periods and rest breaks;*
- *annual leave (both contractual annual leave and statutory entitlement up to the 5.6 weeks under the Working Time Regulations).*

Pay is defined as basic pay plus any additional pay directly linked to work undertaken in relation to the agency worker’s assignment with the hirer, and therefore includes overtime, shift allowances, unsocial hours payments, vouchers or stamps with a monetary value, danger money and bonuses (linked to individual performance only). It will also include holiday pay for any annual leave or statutory entitlement in excess of the 5.6 weeks under the Working Time Regulations.

It is important to remember that payment of the contractual annual leave and statutory entitlement up to the 5.6 weeks under the Working Time Regulations should be made at the time the leave is taken to ensure that individuals do take the leave to which they are entitled. Any additional entitlement in excess of the 5.6 weeks under the Working Time Regulations could be dealt with as an additional one-off payment at the end of the assignment.

Liability

Apart from Day 1 rights (liability for which falls to the hirer), the regulations stipulate that it is the agency that has primary liability for breach of the equal treatment principle. However, this liability could revert

to the hirer if the agency can demonstrate that it has taken all reasonable steps to obtain relevant information and has reasonably interpreted that information, and has applied that interpretation when paying the agency worker for the required period.

Right to equal treatment – Day 1 rights

From Day 1 of an assignment, an agency worker will have the right to access the hirer’s collective facilities such as canteen, gym, crèche, car parking and free transport unless the hirer can justify refusing access.

The agency worker will also be entitled to access information concerning job opportunities within the hirer’s organisation. It should be borne in mind, however, that the regulations place no obligation on the hirer to shortlist, interview or directly engage a temporary agency worker. Indeed, they are explicit in limiting the hirer’s obligation “to inform of any relevant vacant posts so as to give the same opportunity as a comparable employee”. The hirer will be liable for any such breach.

Right to information

An important aspect of the regulations is the requirement for information to be passed between hirer, agency and agency worker.

If an agency worker considers that the hirer or agency has treated him/her in a manner which infringes a right conferred by the equal treatment principle, he/she may make a written request to the agency for information.

Key Terms used in this Guidance Note

An **agency worker** is an individual supplied by an agency to work temporarily for and under the supervision and direction of a hirer, and has in place a contract with the agency. (This could be a contract of employment or any other contract to perform work and services personally for that agency). An individual is not prevented from being an agency worker under the regulations simply because he/she works through an intermediary body – eg, an individual working through an “umbrella company”.

Excluded from the regulations are individuals who are deemed to be genuinely self-employed, limited company contractors who contract directly with the hirer, those working under managed service contracts and employees loaned or seconded to another hirer (eg under the HVCA Loaning of Labour Agreement).

An **agency** is described as an undertaking which supplies individuals to work temporarily for and under the supervision and direction of hirers – properly described as an employment business in the legislation governing employment businesses and employment agencies. It is also defined as an undertaking which is responsible for paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.

A **hirer** is often described as the end user client – ie the party to whom the temporary agency worker is ultimately supplied, and under whose direction and supervision the agency worker operates.

A **comparable employee** is defined as an established, directly engaged employee of the hirer undertaking the same or, broadly similar, job to that of the agency worker. If the agency worker is employed on the same basic working and employment conditions as a comparable employee, the regulations will be deemed to have been complied with.

Even if there is no directly comparable worker, a hypothetical comparator is possible. For example, the regulations could still apply if terms and conditions of employment exist which would otherwise ordinarily be applied to the hirer’s workforce, perhaps through a collective agreement such as the H&V Operative National Agreement, the National Working Rules of the Joint Industry Board for the Electrical Contracting Industry, or the National Working Rules of the Joint Industry Board for Plumbing and Mechanical Engineering Services in England and Wales.

Employment tribunals can also look at matters such as standard pay grades and structures. Government guidance also suggests that holiday and working time rights will be covered if there is a general practice in relation to such matters across the hirer’s organisation.

The agency has 28 days from receipt of the request to provide a written response. If an agency worker does not receive the information from the agency within 30 days, he/she will be able to apply to the hirer for the same information. The hirer must then provide the information within 28 days of receipt.

An employment tribunal can draw inferences from any failure to respond to a written request made to an agency or hirer, or from any inadequate response.

Remedy

An agency worker will be able to present a claim in an employment tribunal where he/she believes that the agency or hirer has breached the equal treatment principle or where he/she believes that the hirer has breached the Day 1 rights described above.

An employment tribunal will be able to make a declaration as to the rights of the agency worker and order compensation to be paid. This will be based on the loss attributable to the breach, but there is a minimum compensation level of two weeks' pay for a breach of the equal treatment principle. The employment tribunal will have the power to apportion liability between the agency and the hirer where appropriate.

Anti-Avoidance measures

The regulations contain anti-avoidance provisions aimed at preventing assignments being structured so as to avoid the obligation to provide equal treatment. Where an employment tribunal rules that intentional avoidance has taken place, it can also impose an additional award of compensation (in each case where compensation is ordered – see previous paragraph) of up to £5,000.

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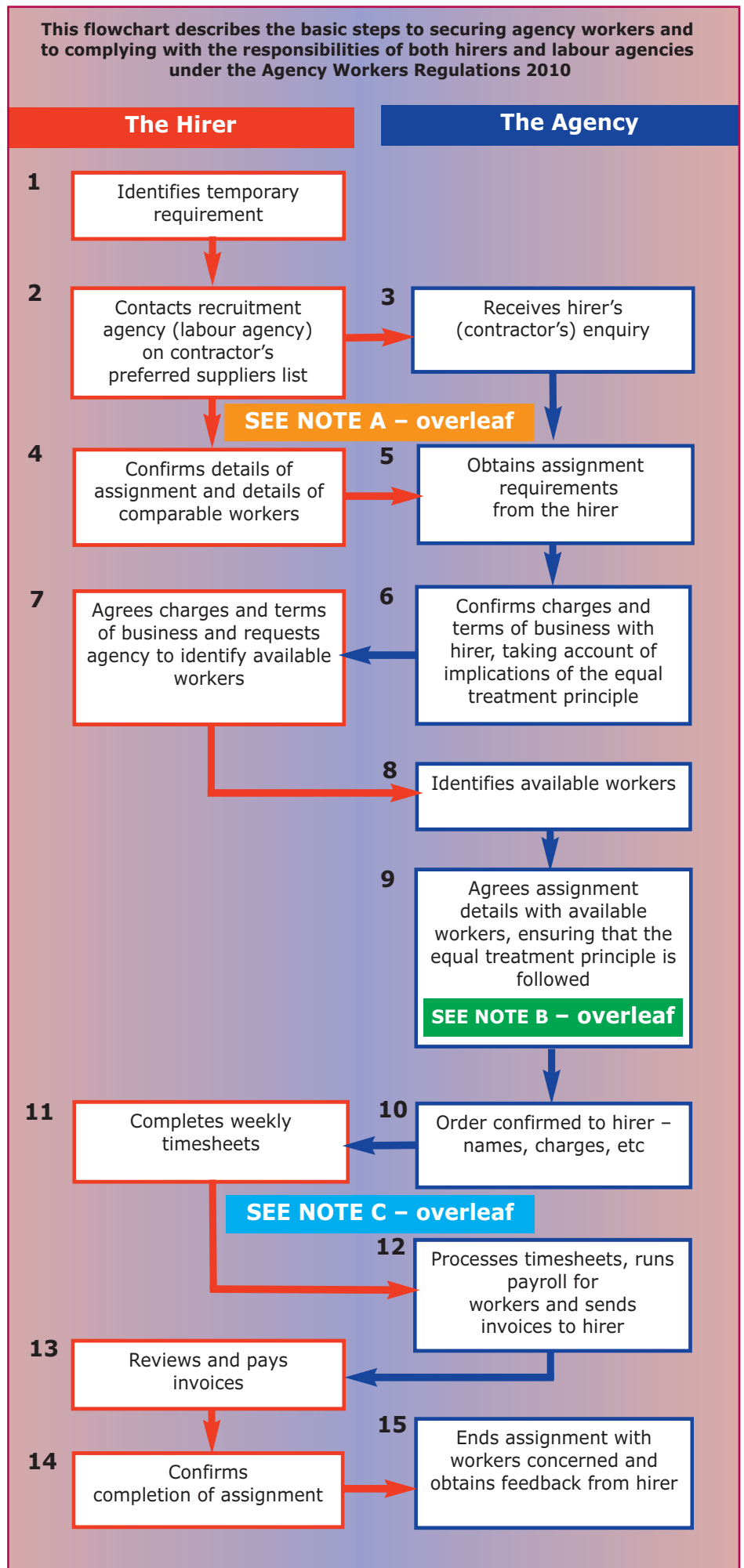
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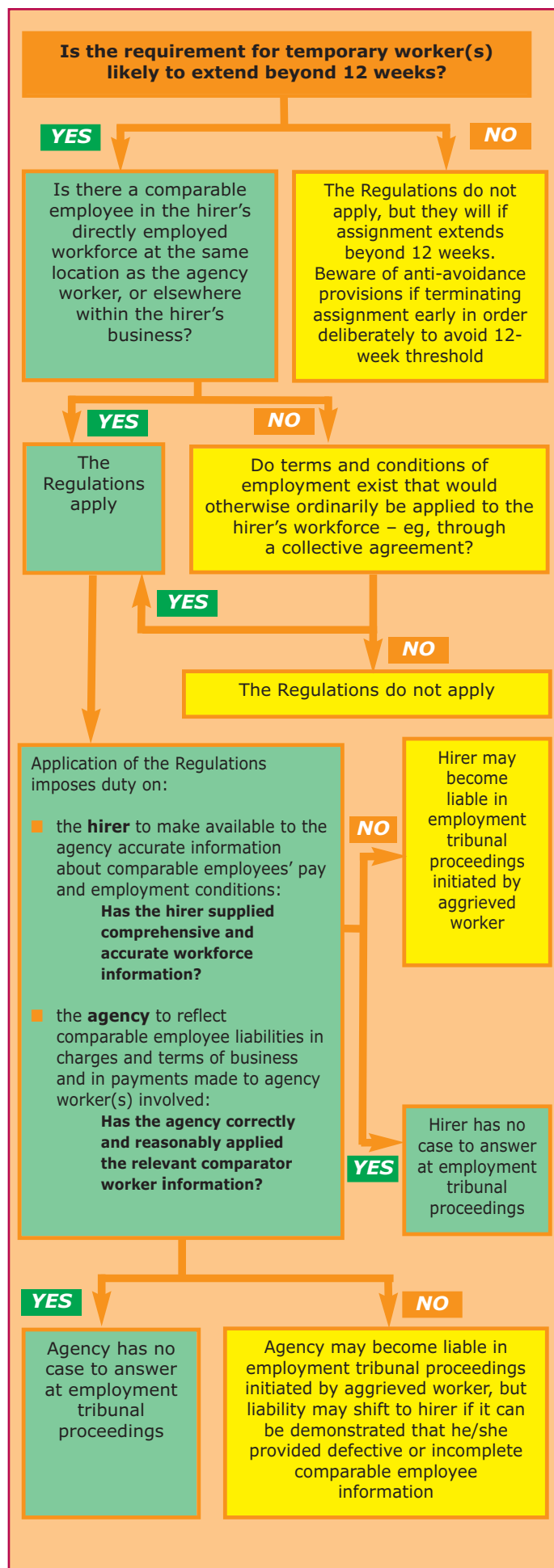
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NOTE A: Be mindful of the length of the assignment



NOTE B: Be mindful of the agency worker's rights after 12 weeks

On completion of the initial 12-week qualifying period and provided the assignment is ongoing, an agency worker is entitled to lodge a written request with the agency for:

- relevant information relating to the basic working and employment conditions in force with the hirer
- the factors the agency considered when determining the basic working and employment conditions applicable to the agency worker, and
- in certain circumstances, the basis on which a comparable employee was identified and the relevant terms and conditions applicable to that comparable employee/worker.

Timeline for dealing with information requests from an agency worker

Step 1	To whom	For what	Response time
Agency worker submits written request	Agency	A written statement relating to the basic working and employment conditions in force in the hirer's business.	28 days from receipt by the agency
Dialogue recommended between agency and hirer during both steps			
Step 2	To whom	For what	Response time
If there is no response within 30 days of making the request at Step 1 Agency worker submits a written request	Hirer	A written statement relating to the basic working and employment conditions in force in the hirer's business	28 days from receipt by the agency

NOTE C: Monitor duration of the assignment

If an assignment extends beyond the 12-week qualifying period, the agency worker(s) will become eligible for the equal treatment principle – effective from the beginning of the 13th week. The regulations do not specify who is responsible for monitoring the duration of assignments, so it makes sense for the agency and the hirer to co-operate on this.

Agencies can help by supplying the hirer with listings of those temporary agency worker(s) on given assignments detailing assignment durations, pay rates, etc. They could also develop appropriate procedures to alert the hirer before the 12-week threshold approaches and to ensure that the worker(s) concerned is/are clearly informed when an assignment has ended.

Hirers can help by keeping their own complementary records of assignment durations, pay rates, etc, and by notifying the agency of any changes in the terms and conditions of their directly employed comparator workers which might need to be reflected in revised payments made to the agency worker(s) concerned.

Both agency and hirer need to be open to the possibility of re-assessment of the agency's charges if the assignment extends beyond 12 weeks, and be mindful of the anti-avoidance penalties contained in the Regulations.