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Agency Workers Regulations Draft Guidance

Response of the Employment Lawyers Association

15 April 2011

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EMPLOYMENT LAWYERS ASSOCIATION

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1. INTRODUCTION

1.1 The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

1.2 A working party was set up by the Legislative and Policy Committee of the ELA under the joint chairmanship of Robert Davies of Dundas & Wilson and Trevor Bettany of Speechly Bircham to consider and comment on the Department for Business, Innovation & Skills ("BIS") draft "Agency Workers Regulations Guidance April 2011" (**Guidance**). Its report is set out below. A list of the members of the sub-committee is annexed to the report.

1.3 Our comments on the Guidance are set out below. The two week time period for commentary has necessarily truncated and limited the scope for review. Hence, many of the observations are in an "expanded bullet point" format.

1.4 We have referred to The Agency Workers Regulations 2010 throughout this document as the "Regulations." Also, the abbreviation "AW" is used in respect of an agency worker.

2. GENERAL / STYLE

2.1 We consider that the structure and layout of the Guidance could be more user-friendly and consistent. For example:

2.1.1 The Guidance would benefit from the use of numbered headings and sub-headings.

2.1.2 Whilst the Guidance is predominantly drafted in the third person, it is occasionally drafted in the second person (eg pp 16, 34). Such approach is inconsistent, confusing and can give the impression that the Guidance is aimed at one particular party in the relationship between the TWA, agency worker and hirer.

2.2 In places the Guidance appears to over-simplify the wording in the Regulations and risks inconsistency with the Regulations themselves. For example:

2.2.1 ("Out of Scope" p.8) – references to "client or customers of the individual" should refer to "a client or customer of *a profession or business carried on by* the individual" (reg 3(2)(a)).

2.2.2 ("In Summary" p. 25) – in the row of the table relating to vouchers or stamps, the phrase "fixed monetary value" is used to describe what is actually a three-part test, namely the requirement for "fixed value" and "expressed in monetary terms" and "capable of exchange for money goods or services" (reg 6(4)).

2.3 For completeness we note that the Guidance contains a number of typographical errors, incorrect punctuation – particularly semi-colons where there should be colons - and some duplication, but we anticipate that these will all be "ironed out" in due course.

3. SCOPE

3.1 We do not consider the Guidance deals adequately with explanations as to the scope of the Regulations.

Definition of Temporary

3.2 Neither the Regulations nor the Guidance attempt to define or explain "temporary" or "temporarily" in regulations 2, 3 or 4. The essence of the Regulations is that they apply to temporary assignments. However, under many labour supply contracts, there is rarely any intention that the workers (typically employees) supplied would work on any other assignment. Indeed, where such contracts are transferred from one contractor to a replacement (often having been originally outsourced), employees may have long service.

3.3 We assume the fact that such contracts may be operated by businesses which may also operate (whether themselves or through other associated companies) as an employment business should not, of itself, attract the cover of the Regulations.

3.4 The absence of any such definition of "temporary" or "temporarily" places greater importance upon the meaning of "working for and under the supervision and direction of a hirer," in determining whether the Regulations apply.

Supervision and direction / managed service contracts

3.5 However, again the Guidance offers little assistance. The issue is primarily addressed on page 8, in the context of "Managed Service Contracts". However:

3.5.1 There is no definition or explanation of a managed service contract – or even any indication as to whether it involves a "managed service company" as defined in Chapter 9 ITEPA 2003 inserted by the Finance Act 2007;

3.5.2 The statement at the foot of page 8 that a mere "on-site presence (e.g. a named supervisor from an agency) is not considered a Managed Service Contract" is of limited assistance. We assume that the Regulations intend to focus upon the degree and nature of such on-site supervision ie whether it provides genuine day to day supervision and direction.

3.5.3 Also, we would question whether the statement, in the final sentence of the penultimate paragraph at page 8 strikes the correct balance.

3.5.4 In practice, it is likely that in any contract where the service is provided by a contractor, the client or end user has a strong or ultimate influence over how the work is done – through service level specifications and with a view to broader commercial considerations. The end user sets the parameters of the service it requires and the contractor then decides how to meet those expectations/service levels. Again, we consider the key issue concerns who manages/decides the day to day task allocation, which worker does what job and how.

Secondments

3.5.5 The issue of whether secondments (eg intra-group, from professional services firms to clients, or post-transaction handovers) fall within the Regulations is not clearly addressed.

3.5.6 The Regulations define TWAs as persons engaged in the economic activity of supplying workers – without stating whether it is intended to exclude secondments.

3.5.7 The Guidance (p.6) further confuses matters. It states that a TWA is "a person in business ... *involved in* the supply of temporary agency

workers." We consider the Guidance should state whether it is necessary that such person or business should be *predominantly* engaged in the business or activity of the supply of temporary workers to fall within the scope of the Regulations. Otherwise, it could be construed that any person or business seconding an individual to a third party "hirer" could be covered by the Regulations.

3.5.8 The second example of out of scope secondment at page 9 is helpful, but it would be even more helpful to explain why the government department is not acting as a TWA given the earlier unhelpful description of a TWA.

In-House Temporary Staffing Banks

3.5.9 The first and second paragraphs under the "In-house" heading on page 9 are confusing. The first paragraph suggests that a hirer supplying temporary workers to "that same business or service" would fall outside the Regulations.

3.5.10 However does the reference to "that same … *service*" mean the service must be carried on by the same hirer (rather than a different group company)? In other words, does this paragraph seek to suggest that a unilateral supply by one company to itself falls outside the Regulations (which must be the case), whereas the second paragraph suggests that the bilateral supply by one company to another group entity falls within the Regulations?

3.5.11 Again, given the absence of any definition of "temporary," the second paragraph suggests that any service company arrangement commonly used to deploy staff amongst group companies would fall within the Regulations – even if the employer regards the arrangements as indefinite or permanent.

3.5.12 However, that suggestion is at odds with the example on page 9 that in a secondment from a government department to a private employer, the government department "is not acting as a TWA". There is no explanation as to why.

"Agency Worker"

3.6 Regulation 3(b)(ii) defines an agency worker as having with a contract of employment with the TWA or a contract to perform work or services personally *for the agency*. The courts could determine that many 'agency workers' only have a contract with the agency to perform work or services for the *hirer* (as typically provided in conditions of engagement) and so are excluded from the definition.

3.7 This problem is ignored, as the Guidance (p.7) simply refers to an agreement "to provide services personally". It would be more helpful (even if not binding) if the

Guidance state that the Regulations are intended to cover such workers ie that the Government considers that agency workers can be viewed as carrying out services both for the hirer and the agency (indirectly).

3.8 The first two "example characteristics" of an agency worker in the box on page 7 are an identical duplication.

4. QUALIFYING FOR EQUAL TREATMENT

4.1 The Guidance describes a 'calendar week' (p.12) as "any period of seven days starting with the first day of an assignment". The Regulations do not define a calendar week. However, the Guidance appears to ignore the word "calendar" and just describes "week".

4.2 A ‘calendar week’ would normally be interpreted as meaning Monday to Sunday. See, for example, the definition of calendar week in the Supplementary Benefit (Transitional) Regulations 1980/984.

4.3 The final line of the summary table at page 14 should refer to contractual as well as statutory maternity, paternity or adoption leave.

4.4 The Guidance makes no reference to the significance or weight of job descriptions in determining comparability. In practice, a TWA will presumably rely upon written information (including job descriptions) provided to it by a hirer.

4.5 The reference on page 17 to anti-avoidance provisions overstates the effect of regulation 9(4) – which provides that the anti-avoidance provisions are triggered where the Tribunal is satisfied that the "most likely explanation" of the structure of assignments is avoidance of the Regulations. Whereas that test suggests a balance of probabilities approach, the Guidance states that "it *would need to be clear that* there was a deliberate and regular pattern designed to avoid the Regulations" – this implies a much higher threshold.

5. ACCESS TO FACILITIES/VACANCY INFORMATION

5.1 We question whether the Access to facilities description is quite right – the Guidance suggests that the right only extends to facilities and amenities if their purpose is to help staff meet the demands of working at a particular location, whereas this limitation is not explicitly contained in the Regulations. An alternative approach would be to say that where facilities are not for this purpose, but rather a benefit for loyalty etc, it is more likely that the hirer would be justified in not providing them to agency workers.

5.2 It would also be helpful to know which side of the line an on-site gym would fall in BIS's view, for example – this is an example of something that is provided by the

hirer on site but does not directly facilitate the workers doing their jobs at that location.[1]

5.3 With regards to access to vacancy information, it is helpful that the Guidance clearly takes the line that it is only information that would be available to a comparable worker in the same establishment that is relevant to the access rights (albeit that the Regs themselves are not that clear). It would be helpful to explain the comment that it does not constrain an employer's freedom as to how they treat applications – ie they could choose to give preference to permanent employees.

6. PAY

6.1 In our view the Guidance should discuss whether the comparison of pay is term-by-term (i.e. the different types of pay) or in aggregate. This would help in the approach to tricky situations, such as the example of a locum professional who receives a higher rate of pay than the incumbent comparator, but the incumbent comparator receives a car allowance effectively as a supplement to basic pay. What is the necessary comparison?

6.2 To compare item by item, would mean:

6.2.1 rate -v- rate : AW better off so no change to rate; and

6.2.2 no car allowance -v- car allowance: car allowance would need to be matched for AW, but without any credit being given for better rate or other items where AW is better off.

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[1] We feel there are practical problems relating to the nuances of benefits where they could fall into either a Day 1 collective facility/amenity, or a benefit in kind. Take gym membership as an example:

- Gym is free, and on site = If it is a collective facility/amenity, agency worker is entitled to access from Day 1.
- Gym is on site but has a membership fee and a waiting list = if it is a collective facility/amenity, agency worker will need to pay the fee and join the waiting list in order to use it.
- Gym is externally run off-site but comparator employee has free access to it = will be a benefit in kind but agency worker is not entitled to have this matched.
- Gym is externally run off-site and hirer has negotiated a 50% discount on membership fees = it's a benefit in kind but is not a voucher and has no fixed value expressed in monetary terms and agency worker is therefore not entitled to have this matched.
- Gym is externally run off-site and hirer gives its employees a £150 voucher per year towards membership fees = it's a benefit in kind but meets the criteria in reg 6(4) and agency worker is therefore entitled to have this matched. (NB: is agency worker entitled to 100% of the voucher, or pro rated to reflect the proportion of the year in which they worked for the hirer?)

The nuances in this example are minor but they have a major impact on whether the benefit needs to be matched.

6.3 Alternatively, to compare package -v- package, would enable credit to be given for items where the AW is better off than a directly hired employee. This would seem to better address the intention of the Regulations which is to make sure that the AW is not worse off than if they were in direct employment.

6.4 It would also be helpful to address how the Regulations apply to employers with a flexible benefits scheme eg where part of the flexible benefits "pot" can only be used for a benefit not covered by pay.

6.5 It would be worth making clear that AWs will have to be paid according to their own qualification/skill level, even if overqualified for the job.

6.6 It is slightly misleading simply to list items included in pay and items excluded, given the position under the Regulations that all payments in connection with the employment are covered unless in the excluded list. This should be clearer.

6.7 The manner of the reference to custom and practice payments is problematic – it would be better to make the general point at the outset that contractual terms need not necessarily be express or written, and can include pay-related terms implied by virtue of custom and practice. The Regulations themselves (oddly) still define pay as including sums payable under contract "or otherwise", although the Regulations only bite on terms ordinarily included in contracts. It might be useful for the Guidance to address and explain this to avoid confusion.

6.8 The excluded list should also contain payments for retirement or as compensation for loss of office.

6.9 The list should also mention the relevant ERA 1996 time off rights not just the time off for trade union duties.

7. BONUS/APPRAISALS

7.1 The Regulations adopt a restrictive stance towards the matching of bonuses in regulation 6(3)(f). Specifically, only bonuses that relate to "the amount or quality of the work" performed by the agency worker need to be matched, but otherwise any bonuses/incentives/rewards that are not given for that reason do not need to be matched because they are excluded by regulation 6(3)(f). That sub-regulation gives "a payment to encourage the worker's loyalty or to reward long-term service", as an example (only) of a bonus that would be given for a reason other than the amount or quality of work done. It seems clear from the wording in regulation 6(3)(f) that the intention is:

7.1.1 **Must be matched** = Bonuses which are *directly attributable* to the *amount or quality of the work* done by a worker.

7.1.2 **Exempted, need not be matched** = bonuses given for a reason other than the amount or quality of work done (i.e. everything else).

7.2 In other words the Regulations themselves seem to adopt an *exclusion* approach.

7.3 But in contrast, the Guidance appears to describe an *inclusion* approach of "unless the Regulations exclude it then it has to be matched" – and in doing so have narrowed or misinterpreted the regulation 6(3)(f) exclusion. The Guidance appears to have ignored the wording in the Regulations "directly attributable" and "amount or quality of the work". Alternatively, it may stem from a focus on the concept of "individual performance" rather than bonuses that are "*directly attributable to the amount or quality of the work done by the worker*" . For example:

7.3.1 p.21 - in the first list, penultimate bullet, use of "contribution of" whereas "amount or quality of work done by" would track the Regulations better.

7.3.2 p.21 - under the heading 'Bonuses linked to individual performance', use of "to the work" rather than "to the amount or quality of the work".

7.3.3 p.21 - the third bullet which suggests bonuses should be matched if they are payable to staff who consistently respect company standards or values – this does not seem to be "directly attributable to the amount or quality of work done" and therefore ought to be excluded by Reg 6(3)(f), not something that ought to be matched.

7.4 We anticipate there may be challenges in the identification of a workable approach to appraisals in practice. A TWA's performance appraisal is likely to be limited to factors such as, colloquially, "did the AW turn up, and perform the work they were asked to". Whereas any hirer's bonus-based appraisal system may be more nuanced than that. As such, would an AW who achieved what the TWA was looking for in terms of its appraisal receive 100%, whereas a hirer's employee would not?

7.5 Clearly any degree of integration into the hirer's appraisal process may be viewed as a Tribunal as being a relevant factor in respect of employment status, and this may be problematic for hirers.

7.6 Consequently, it would be helpful if the Guidance advised hirers to make it clear in their appraisal system documentation that the reason for including agency workers is solely to fulfil obligations under the Regulations and is not to be treated as an indicator of employment status.

7.7 The suggestion that where a bonus is a hybrid scheme then hirers should identify the part of the award linked to company performance and the part of the award linked to individual performance and pay accordingly, we felt this could be very difficult for hirers to achieve. Query also whether this approach is consistent with the concept that only bonuses which are "***directly attributable*** to the amount or quality of the work done by a worker" need to be matched.

7.8 With regard to "annual pay awards" we wondered if it might be more helpful to say that TWA's will need to keep abreast of annual pay increases at the hirer and may

wish to communicate with their clients on a regular basis (once a year?) to make sure they have the most up to date information which applies to relevant terms ?

8. WORKING TIME AND HOLIDAY ENTITLEMENTS

8.1 It would be helpful to include guidance/commentary about how the provisions would work in sectors such as the teaching profession where employees are entitled to lengthy contractual annual leave – e.g. if the AW is engaged for the summer term (assuming in excess of 12 weeks), are they then entitled to payment for the full summer holiday or is the entitlement pro rated for the time they have worked in total or in excess of the qualifying period.

9. PREGNANT WORKERS

9.1 Guidance on when it will be reasonable to expect a hirer to make adjustments to an agency worker's role for health and safety reasons, particularly in terms of cost, would be helpful, as would guidance on how to determine the likely duration of the assignment.

10. PAY BETWEEN ASSIGNMENTS

10.1 Presumably the reference at page 33 to giving 4 weeks' notice in parallel with offering 4 weeks of reasonable work is only relevant where the employee turns down the work – this should be made clear.

10.2 Ideally there would be guidance as to what will constitute "reasonable steps" and whether there are any criteria or whether there is any order of priority in offering a "suitable new assignment" or in proposing any particular worker for such assignment.

11. HOW TO IDENTIFY BASIC WORKING AND EMPLOYMENT CONDITIONS

11.1.1 The discussion on the meaning of terms and conditions should include a reference to terms implied by custom and practice, to be consistent with the earlier parts of the Guidance and avoid confusion. This was in the original draft guidance text on this issue (annexed to the Consultation Paper).

11.1.2 Page 37 – the summary table needs to be revised. At the very least it needs some introductory and explanatory wording.

12. INFORMATION REQUESTS

12.1 With regard to page 39 – the Guidance should make it clear that it is for the TWA and hirer to agree about the provision of information – the Regulations simply require that the TWA takes reasonable steps to obtain the information in order to avoid liability. The 3rd bullet in box too goes too far – it is only bonus schemes that have to be matched that would need to be covered.

13. ACTUAL OR HYPOTHETICAL COMPARATOR

13.1 We recognise that there are conflicting views on the approach ultimately required by the Regulations and do not propose to rehearse the arguments here. However, we think that TWA's, hirers and AW's alike would benefit from a more explicit/comprehensive articulation of the position in the Guidance. The lack of clarity in the summary table at page 37, mentioned above at 11.1.2, brings this into sharp relief.

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