



The Law Society

Law Society response to the Department for Business, Enterprise and Industrial Strategy consultation on agency workers

May 2018

Preface

1. The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

Improving the transparency of information provided to work seekers

2. There is a great deal of potential for confusion about the employment status of a agency worker and who their employer is. It is not always clear if agency workers are employees and, if so, who the employer is. Employment Tribunals presented with such cases have to decide whether a contract for service exists in the context of a tripartite relationship between the agency worker, the employment business/agency and the end-user. Agency workers are not necessarily working on short-term arrangements and in some instances, arrangements can last for several years, exceeding the qualifying service required for bringing an unfair dismissal claim.
3. In theory an agency worker, for the purposes of the Agency Workers Regulations 2010 SI 2010/93, does have a formal definition¹. Within that formal definition an agency worker could potentially be treated as:
 - self-employed,
 - a limb (b) worker, or
 - an employed individual.
4. Each of those definitions embodies a different balance of rights between the worker and employer. Further, it is also possible to have situations where a worker has employee status but never acquires employment protection rights due to breaks in their continuity of service. Another important factor to consider is that the definitions of employee and worker inevitably turn on findings of primary fact by the employment tribunal.
5. There are two main uncertainties around the protections offered to agency workers:
 - There is the uncertainty of employment protection rights, not definitively answered by the Agency Workers Regulations (the Regulations), because of the problems outlined above and because the interpretation of those Regulations has been far from straightforward².
 - A further level of ambiguity in agency-type arrangements is introduced by the provision of section 41 of the Equality Act 2010. This provision gives potential protection from discrimination to certain workers from the acts of end-users, although if there is no contractual relationship between the worker and an agency or the end-user, then the individual will be left without any remedy at all. In *Alderson v Meridian Business Support Ltd and East Lancashire Hospitals NHS Trust* [2010] EqLR 113 a cleaner whose engagement ended when she told the agency and end-user that she was pregnant was found to

¹ see Regulation 3

² see *James v Greenwich London Borough Council* [2008] ICR 545;

be in a position where there was no jurisdiction to hear her complaint on the basis of the absence of a contractual link. Against this, a different view was taken in *London Borough of Camden v Pegg* UKEAT/0590/11.

6. We support the recommendation that all agency workers be given a factsheet that sets out key information they need to know about their employment. We would envisage the fact sheet containing information on:
 - a) Who will be responsible for paying the work seeker, and how they are being engaged;
 - b) Any other fees, costs or charges that will be deducted and what they relate to.
 - c) Who will be responsible for the employment of the work seeker;
 - d) How much the work seeker will be paid by the umbrella company or intermediary ; if appropriate, including highlighting any fees payable to the umbrella or intermediary by the work seeker;
 - e) What statutory deductions will be made; and
 - f) What additional benefits there are e.g. access to a benefit in kind scheme, childcare vouchers, group insurance policies.

Extending the remit of the Employment Agency Standards inspectorate to cover umbrella companies and intermediaries in the supply chain

7. We would support extending the remit of the Employment Agencies Standards (EAS) to cover umbrella companies and other intermediaries in the supply chain. This would create a clearer regulatory structure. Currently EAS inspectors can only take enforcement action and apply penalties to recruitment agencies and not the end user of the agency workers. This can confuse those who may wish to make a complaint and make it unclear how to hold the end user responsible for their regulatory and legal obligations.
8. The definitions of an employment agency and an employment business should be more closely aligned to the usage of the terms in practice. This will facilitate better understanding of the relevant regulations.
9. It is our experience that among work seekers an 'employment agency' is more commonly understood to mean a business which employs the work seeker and supplies them to its end client on temporary contracts covering for example, maternity leave or holiday. Workers commonly fill in timesheets and submit them to their 'agency' which is then responsible for paying them. Under the Employment Agencies Act 1973 (the Act) however, that arrangement is said to be an employment business.
10. Conversely, businesses which place people into jobs permanently, where they are introduced to the business looking to employ someone directly, are more commonly referred to as 'recruitment companies'. Under the Employment Agencies Act 1973 however, that arrangement is described as an employment agency relationship.

11. There is often a difference between what is understood to be an 'employment agency' and what is meant by the legislation. This makes the Act and consequential regulations difficult for workers to decipher and are a barrier to them understanding their rights.

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