

**PROTECTION OF EMPLOYEES
(TEMPORARY AGENCY WORK) ACT, 2012.**

GUIDANCE

Brief Overview

Purpose of the Guidance document

This guidance document is intended to assist Agency Workers, Hirers of Agency Workers, and Employment Agencies to understand better the provisions of the Protection of Employees (Temporary Agency Work) Act, 2012 including the entitlements conferred and the obligations and responsibilities for all parties involved. It is intended as guidance only and does not purport to present a legal interpretation of the Act.

Rationale for the Act

The Act implements into Irish law the provisions of EU Directive 2008/104/EC on Temporary Agency Work adopted in 2008 with a transposition date of 5 December 2011.

Main objectives of the Act

The Act applies the principle of equal treatment in terms of basic working and employment conditions for agency workers in the same way as applies to employees recruited directly by the Hirer to do the same or a similar job.

Effective date of the Act

- With the exception of “pay”, the provisions of the Act came into effect on the date of enactment on 16 May 2012.

The Pay provisions of the Act are being made retrospective. This means that agency workers, who are on assignment on 5 December, 2011 are entitled to equal treatment in relation to Pay from 5 December, 2011.

In respect of agency workers that commenced assignment after 5 December 2011, the provisions relating to pay take effect from the date of their assignment.

- Provisions in relation to Section 13 and Section 22 of the Act in relation to offences came into effect on 17 May, 2012.
- In relation to all other entitlements, the Act is effective from the date of enactment of the Act i.e 16th May, 2012.

Who is affected by the Act?

- **Agency Workers** i.e an individual employed by an employment agency under a contract of employment by virtue of which the individual may be assigned to work for, and under the direction and supervision of, a person other than the employment agency;

- **Employment Agencies** i.e a person (including a temporary work agency) engaged in an economic activity who employs an individual under a contract of employment by virtue of which the individual may be assigned to work for, and under the direction and supervision of, a person other than the first-mentioned person;
- **Hirers of agency worker** i.e a person engaged in an economic activity for whom, and under the direction and supervision of whom, an agency worker carries out work pursuant to an agreement (whether in writing or not) between the employment agency by whom the agency worker is employed and the first-mentioned person or any other person;

The Act does not apply to:

- (a) Persons who work as independent contractors, are in business on their own account and who are placed by an Employment Agency, where the status of the Hirer is that of a client or customer.
- (b) Placement services i.e. where the ‘employment agency’ introduces a person to an employer for a directly employed position that is paid by the employer. Upon placement with an employer, there is no further contractual relationship between the individual and the employment agency.
- (c) Managed Service contracts i.e. persons who work under the supervision and direction of the organisation/company which employs them and not under the supervision and direction of the company where they work i.e. the Hirer.

Where a company provides a specific service to a customer, such as catering or cleaning, this is usually known as a Managed Service Contract which is based on a contract for the provision of services that will often set out agreed service level arrangements. The Managed Service Contractor has responsibility for managing and delivering the particular service and employs, rather than supplies, the workers.

How will the Act affect Agency Workers?

- Agency workers will be entitled to equal treatment in relation to their basic working and employment conditions as if they were directly recruited by the Hirer to the same or similar job.
- For the purposes of the Act, the date of assignment of an agency worker assigned to a Hirer **prior to 5 December, 2011** is deemed to be 5 December, 2011.
- Agency Workers **on assignment on 5 December, 2011** are entitled to equal treatment in relation to pay from 5 December, 2011 as if they had been directly recruited by the Hirer to do the same or similar job.
- Agency workers **assigned to a Hirer on or after 5th December, 2011**, are entitled to equal treatment in relation to pay from the date of assignment as if they had been directly recruited by the Hirer to do the same or similar job.

- Agency workers are entitled to all other aspects of equal treatment in basic working and employment conditions from the date of enactment of the Act.
- Agency workers are entitled to information on job vacancies in the Hirer from the date of enactment of the Act in the same way as if they had been directly recruited by the Hirer to the same or similar job.
- Agency workers are entitled to access collective facilities and amenities from the date of enactment of the Act in the same way as if they had been directly recruited to the Hirer to occupy the same or similar job. This is the only aspect of the legislation that allows for objective justification for refusal by a Hirer to the facilities/amenities. The objective justification cannot be based on economic considerations but would, for instance, allow for a situation where a rota system/waiting list applies to direct employees for particular facilities. In the same way, this conditionality would apply also to agency workers.

Obligations for employment agencies:

- The employment agency is the employer of an Agency worker and is responsible for claims arising in respect of equal treatment of basic working and employment conditions in relation to A-H below under “what is meant by basic working and employment conditions”. (I-J below under “what is meant by basic working and employment conditions” are the responsibility of the Hirer).
- An employment agency supplying Agency Workers to a Hirer should ensure, in consultation with the Hirer, that the appropriate pay and basic working conditions are applied so that Agency workers are afforded equal treatment as if they had been directly recruited to the same or similar job by the Hirer.

Obligations on hirers:

- A hirer who hires agency workers through an employment agency should provide the Agency with sufficient up-to-date information on basic pay and employment conditions so that the Agency, as employer, can satisfy itself that an Agency Worker is getting equal treatment, as if they had been recruited directly to the same or similar job.
- The hirer is responsible for ensuring that all agency workers can access collective facilities and amenities and access information on job vacancies at the hirer undertaking.

Responsibilities of employment agencies and hirers

In order to allow for the application of equal treatment, the Act requires enhanced communication between the employment agency and the hirer:

- The **hirer** should provide the employment agency with up-to-date information on Terms and Conditions of employment, so that they can ensure that an Agency Worker receives the correct equal treatment in terms of basic working and employment conditions as that of directly recruited employees of the hirer doing the same/similar job.
- The **hirer** must inform the employment agency of the correct rate of pay, annual leave entitlements and any other payment arrangements/allowances that an agency worker is entitled to under the Act (i.e. what would they have been paid if directly recruited to the same or similar job?).
- The **hirer** is responsible for ensuring that an agency worker can access collective facilities and amenities on the same basis as directly recruited employees. The hirer can refuse access only on the basis of objective justifiable grounds.
- The **hirer** is responsible for ensuring that an Agency Worker has access to job vacancies within the Hirer on the same basis as directly recruited employees.
- The **employment agency** has a responsibility to provide the agency worker with the corresponding entitlements in basic working and employment conditions as that enjoyed by directly recruited employees of the hirer. The employment agency remains the employer of the agency worker.

What is meant by basic working and employment conditions?

This is defined as:

- (a) Basic pay
- (b) Working time
- (c) Rest periods
- (d) Rest breaks during the working day
- (e) Night work
- (f) Overtime
- (g) Annual leave
- (h) Public holidays
- (i) Access to collective facilities and amenities (e.g. canteen, childcare and transport Facilities, etc)
- (j) Access to information on vacancies in the hirer company

Put simply, the requirement is to treat the temporary agency worker as if he/she had been recruited directly by the hirer to the same or similar job in the context of the entitlements outlined at (a) to (j) above. These terms and conditions are ordinarily included in enactments, collective agreements or other pay arrangements that apply generally in respect of employees or any class of employees such as:

- A statement of terms and conditions of employment
- a contract of employment
- established payscales
- any enactment or collective agreement

In most cases, equal treatment can be simply established by giving the same relevant rights to an agency worker, as if he/she had been recruited as an employee to the same or similar job and can be tested by asking e.g. what pay/holidays etc. would accrue given the job/role being undertaken.

Beyond the aspects outlined, the legislation does not confer any entitlement to equal treatment outside of those areas so that it is permissible to have terms and conditions over and above those aspects that may apply to direct employees only.

What is included in “Pay”?

“Pay” is defined in the Act in an exhaustive manner as follows:

- **Basic Pay**, and any pay in excess of basic pay in respect of –
- **Shift work**, if applicable, i.e. if a directly recruited employee in the same or similar job would get paid a shift work premium then the agency worker is entitled also to be paid this premium at the same rate.
- **Piece work**, if applicable. While the term “piece work” is more traditionally linked with the manufacturing sector, it applies in a wider context to output performance bonuses, commission linked to sales, output or production targets etc.
- **Overtime payments**, if applicable. If a directly recruited employee in the same or similar job would get paid overtime rates then the agency worker is entitled also to be paid overtime at the same rate under the same terms and conditions.
- **Unsocial hours worked**, if applicable. If a directly recruited employee in the same or similar job would get paid a premium for working unsocial hours, the agency worker is entitled also to be paid for working unsocial hours at the same rate.
- **Hours worked on a Sunday**, if applicable. If a directly recruited employee in the same or a similar job is paid a premium for working on a Sunday, the agency worker who works on a Sunday is entitled also to be paid the same rate for hours worked on a Sunday.

“Pay” does not include for example:

- Occupational social security schemes
- Pensions
- sick pay
- financial participations schemes

The exclusion of these elements in the Act does not prohibit an employer from providing benefits in the nature of pay in excess of the basic terms should he/she so wish.

The Act specifically allows for the application of arrangements whereby agency workers are entitled to conditions that are better than the basic working and employment conditions provided in the Act.

How does a Hirer decide what rate of pay an agency worker is entitled to be paid?

The Act does not prescribe the rate of pay other than to require that the rate of pay for the agency worker should be the same as would apply if he or she were employed by the hirer directly to do the same or similar job. There must be regard for established payscales, collective agreements, terms and conditions of employment etc. that apply in enactments, collective agreements or any arrangements that apply generally in respect of employees or to a class of employees.

Anti Avoidance Provisions:

Employment agencies, hirers and agency workers should be aware of the anti-avoidance provisions of the Act which prevent a series of assignments, of the same or similar nature, with the same hirer being structured so as to prevent an agency worker from accumulating service with that hirer.

If an agency worker has been assigned to the same Hirer over a number of successive assignments, the starting date of the first assignment will be the start of their assignment for determining the commencement date of that assignment. This is to ensure that agency workers can, in the same way as directly recruited employees, accumulate service. It is important to note that the time between assignments does not count towards the accumulation of service.

To determine whether the assignments should be treated as a single assignment and hence claim the date of first assignment as the effective commencement date the following must apply:

- the assignment must be with the same hirer;
- the agency worker is the same person in each assignment;
- the agency worker works in whole or in part at the same place of work or the work is directed and supervised from the same place in circumstances where the agency worker works or is required to work at different locations and,
- the work done is the same or of a similar nature and undertaken in the same or similar conditions with any differences being of minor significance.

If the break between assignments is longer than 3 months this constitutes a break in service and subsequent assignments with the same hirer would be deemed to commence anew.

Working Time and annual leave entitlements

In respect of rest periods, rest breaks during the working day, annual leave and public holidays in addition to statutory entitlements an agency worker is entitled to the same entitlement as if they had been directly recruited to the same or similar job so that for e.g. if a direct recruit is entitled to a 30-minute rest break, the agency worker is entitled to the same. If the direct recruit is entitled to a paid break, the agency worker is entitled to this also.

In relation to annual leave, if the company provides an entitlement to annual leave in excess of the statutory minimum and e.g. a direct recruit is entitled to 25 days annual leave in any 12-month period, the agency worker is entitled to the same, pro-rated in the case of agency workers who are on assignment for only part of a leave year. Additionally, agency workers are entitled to statutory public holiday entitlements in the same way as direct recruits.

Collective Facilities and Amenities

Agency workers are entitled to be treated no less favourably than a direct recruit in relation to access to collective facilities and amenities provided by the hirer. This is not intended to extend to all benefits that a hirer might provide to directly recruited workers or employees. Rather, it applies to collective facilities and amenities provided by the Hirer to employees, or to particular groups of workers or employees. These may include for example:

- canteen or similar facilities;
- a workplace crèche;
- transport services such as local pick-up and drop off transport service or transport between sites but does not extend to e.g. benefit-in-kind type entitlements or contributions towards company cars;
- toilet/shower facilities;
- staff common room/kitchen facilities;
- food and drinks machines;
- car parking.

This is **not an exhaustive list**, and acts only as an indication of the kind of facilities which should be included. It applies to facilities provided by the hirer and these facilities will usually be on-site. However, if, for example, a canteen is used on another site, or shared with another company, then this should also be available to agency workers.

These facilities should not be refused to agency workers other than on the basis of objective justification. For instance, if access to a crèche involves joining a waiting list, agency workers would be entitled also to join the list, but would not be entitled to queue jump ahead of other direct employees also on the waiting list.

This right of access to facilities/amenities is essentially about access to onsite facilities/amenities and does not extend to off-site facilities, or benefits in kind, which may be provided by the hirer as part of a benefit package to reward long-term service and loyalty such as e.g. subsidised access to an off-site gym, although this does not of course, prevent hirers offering such benefits to agency workers, should they choose.

Collective Facilities/amenities - *Objective justification*

In relation to relevant collective facilities, an agency worker has the right to treatment that is no less favourable than that given to an actual direct recruit. This is the only element of the Act that allows for '*objective justification*' for less favourable treatment. Essentially, hirers would have to ask themselves: "Is there a good reason for treating the agency worker less favourably?" and be able to provide robust evidence in support of that position.

An economic reason such as the cost of collective facilities is not considered as an objective reason justifying a difference in treatment. Practical and organisational considerations could also be a factor, however this does not mean that unfair discrimination will be allowed to take place.

Even if there is a basis for *objective justification*, hirers may wish to consider whether it is feasible to offer agency workers certain access to facilities on a partial basis, as an alternative to exclusion altogether.

Access to information on job vacancies

Agency Workers are entitled to be provided with information about any relevant job vacancies within the hirer that would be available to a direct recruit. Hirers can choose how to publicise vacancies, whether via the internet/intranet, or on a notice board in a communal area. Whatever method the hirer uses to publicise this information, the agency worker should know where and how to access it.

The above obligation does not, however, constrain hirers' freedom regarding:

- any qualification or experience requirements, such as time in service with the organisation; or
- the manner in which they treat applications.

The hirer is responsible for providing equal treatment entitlements in relation to access to collective facilities and amenities and access to job vacancies, and is liable for any breach of these obligations as the Agency has no control over these aspects when an agency worker is on assignment with a hirer.

Pay between assignments (also known as the "Swedish Derogation")

The Act allows for a derogation from the principle of equal treatment in relation only to Pay in respect of agency workers who have a contract of indefinite duration with the employment agency. This means that agency workers who have such contracts with an agency do not

have to receive equal treatment in relation to pay, provided they are paid in between assignments. The Act specifies conditions that attach to this exemption:

- An agency worker must be made aware that if they sign a contract of indefinite duration, they are exempt from the provision of equal treatment insofar as it relates to Pay. An employment agency should inform the agency worker in writing of the implications of this derogation so they can make an informed decision as to whether they are willing to agree to forego this right and enter into such a contract.
- The contract of employment has to contain a statement to the effect that entering into such a contract means that the agency worker does not have a right to equal pay, as set out in the Act. All parties should keep a copy of this notification signed by both the hirer and the agency worker for future inspection.
- An agency worker must be paid for the duration of their time between assignments (i.e. during the periods when they are available for work but are not working i.e. when there are no available suitable assignments).
- An agency worker must be paid between assignments at a level of 50% of their wage paid during their last assignment and, at a minimum, not lower than the National Minimum Wage.
 - If their last assignment was covered by an enactment or collective agreement then an agency worker must be paid between assignments at a level of 50% of their wage paid during their last assignment and at a minimum not lower than their pay rate under the collective agreement or enactment.
- An agency worker is entitled to all other elements of basic working and employment conditions outside of pay.

Offences:

- to charge fees - Section 13

It is an offence for an employment agency:

- (i) to charge the agency worker a placement fee i.e. charging for the introduction to a third party (hirer) to another person for the purpose of direct employment;
- (ii) to charge the agency worker a fee subsequent to their assignment with a Hirer in the instance that the Hirer offers direct employment.

- Whistleblowing and Penalisation

The Act contains a number of standard whistleblowing provisions that are common to a number of other statutes. The Act protects any persons who report any breaches of this Act to the Minister or An Garda Síochána. It is, however, an offence to falsely report breaches of this Act to the Minister or to An Garda Síochána.

A hirer or agency is prohibited from penalising a person for reporting breaches of this Act. Penalisation of an agency worker by a Hirer or employment agency could be in the form of:

- suspension, lay-off or dismissal (including unfair dismissal)
- the threat of suspension, lay-off or dismissal
- demotion or loss of opportunity for promotion
- transfer of duties, change of location of place of work, reduction in wages or change in working hours,
- imposition or the administering of any discipline, reprimand or other penalty (including a financial penalty and
- coercion or intimidation

However, unlike the penalisation provisions of other statutes, the Act provides separately, given the unique 3-way relationship of agency work, for penalisation by the hirer and by the agency.

In relation to agency workers, while all of the above acts constitute potential acts of penalisation where the worker has suffered detriment as a direct result of those acts, account needs to be taken of the nature of temporary agency work, which, by its nature, involves as of normal, movement to working at different locations and on different duties as new assignments occur.

Redress – Rights Commissioner

If an agency worker believes they are not receiving equal treatment in relation to their basic working and employment conditions, they should firstly go to the employment agency and discuss the matter with them. If this first step does not resolve the matter, the agency worker can take a case to the Rights Commissioner of the Labour Relations Commission for adjudication.

Claims

An agency worker or any trade union representing the agency worker can make a claim to the Rights Commissioner for adjudication against the **employment agency** in relation to:

- Basic working and employment conditions
- If they have been charged a placement fee
- If they have been penalised for reporting a breach under the Act

An agency worker or any trade union representing the agency worker can make a claim to the Rights Commissioner against a **hirer** in relation to:

- access to job vacancies,
- access to collective facilities and amenities
- if they have been penalised for reporting a breach.

The Act states that a complaint can be made to the rights commissioner within 6 months from contravention of the Act and if a Rights Commissioner is satisfied that the failure to present the complaint was due to reasonable cause they can accept a complaint up to 18 months from the contravention date.

Under the Act, the Rights Commissioner, on receipt of a complaint, will send a copy of the notice of complaint to the employer. The Rights Commissioner will then give the parties an opportunity to be heard by him/her and to present any evidence relevant to the complaint. After hearing the parties, the Rights Commissioner will issue a written decision.

A decision of the Rights Commissioner shall do one or more of the following:-

- Declare that the complaint was, or was not, well founded,
- Require the employer to take a specified course of action (including reinstatement or reengagement of the employee in circumstances where the employee was dismissed by the employer or,
- Require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances but not exceeding 2 years remuneration in respect of the employee's employment.

Appeals

A party concerned may appeal the Rights Commissioner's decision to the Labour Court within 6 weeks from the date it was communicated to the parties. The Labour Court shall copy the notice of appeal to the other party and hear the parties according to its own procedures.

A complaint by an employee that a Rights Commissioner's decision has not been implemented may be made by the employee concerned to the Labour Court 6 weeks after the date on which the decision was communicated to the employee. The Court will issue a determination to the like effect of the Rights Commissioner's decision. The Act precludes the Court from hearing the employer concerned or other evidence in this case.

Possibility for indemnification of Agency where the Hirer has not provided correct information

The Act requires the Hirer to provide accurate information to the employment agency in order for the agency to comply with the Act and pay the agency worker correctly. If a claim is made by an agency worker that they have not received equal treatment in relation to their basic working and employment conditions and it is found by a Rights Commissioner that the agency worker was not paid the correct rate of pay, the employment agency must rectify this, however, the Hirer shall indemnify the employment agency in respect of any loss incurred by the employment agency that is attributable to such failure.

The Act maintains the tripartite nature of agency working and the employment agency remains the employer and any actions taken by hirers in compliance with the Act should not be taken as evidence that a direct employment relationship exists between the hirer and the agency worker.

For queries in relation to this document, please contact Workplace Relations Customer Service on Locall 1890 80 80 90 or www.workplacerelations.ie

