



PREPARING FOR THE END OF SWEDISH DEROGATION CONTRACTS FROM 6 APRIL 2020

Checklist for agencies November 2019

From 6 April 2020, regulation 10 of the Agency Worker Regulations 2010 (AWR) will be repealed. As a result agency workers who work on Swedish derogation contracts will immediately become be entitled to equal pay rates. I.e. they will be entitled to be paid at least the same rate of pay that they would receive if they were engaged directly by the client they are supplied to, together with all other AWR rights they already have the benefit of.

The following questions will help you to assess the impact of the changes on your business. Please read them in conjunction with the [REC AWR Repeal of Swedish Derogation Contracts Guidance](#).

For further information about the AWR please see [AWR section of the REC Legal Guide](#).

1. Will the changes apply to you?

Do you have any agency workers on Swedish derogation contracts (SD contracts) currently? If so how many?

If you do have SD agency workers, the changes will apply to you. The number of workers you have will dictate the impact on your business in terms of the preparation required and any cost implications.

Do you work with any umbrella companies/other intermediaries that employ the agency workers you supply to your clients? Do they currently use SD contracts for those agency workers?

Even if you do not directly employ agency workers on SD contracts, you could be indirectly affected by the changes if you work with umbrella companies or other intermediaries that use these contracts.

They will need to adjust the rates of pay for agency workers they employ. In order to do so correctly, they will need to have information from your client(s) about the equal pay rates.

They may seek the information themselves or expect you to obtain and provide this to them. Either way, the liability for the failure to provide equal treatment to agency workers (including equal pay rates) can fall to a client, umbrella company, agency or all three. It is therefore in your interests and an agency, to ensure that any umbrella company or intermediary in your supply chain that uses SD contracts puts measures in place to comply with the changes.



2. Talking to your clients

How many clients do you supply SD agency workers to?

Different clients may require different actions. Some clients may be more aware of the approaching 6 April 2020 changes than others. Some of your clients may not even be aware, and you will need to engage early with them to explain what will be happening and the impact.

If you do have a number of clients that you supply SD agency workers to you will need to plan your engagement with them and allow plenty of time to respond to any measures they propose to take.

Are your clients asking you to cease supplying agency workers on SD contracts? If so when? If you do not make the changes the client has requested will your contract with the client be under threat?

If you are being put under pressure to stop supplying agency workers on SD contracts ahead of 6 April 2020, you will need to take into account:

- Whether your client will be prepared to immediately increase charge rates to cover the cost of the equal pay that agency workers will be entitled to.
- Whether you are able to then introduce equal pay rates without changing any other provisions in your agency workers' contracts.
- Whether you need to change the type of contracts that your workers are engaged on – e.g. so there is no longer an obligation to pay between assignments, but in turn your agency workers will immediately be entitled to equal pay.

Do you know what the parity rates will be/are?

This information is vital as agency workers will be entitled to receive at least the same amount of pay as the pay received by staff engaged by your clients directly from 6 April 2020 or sooner if they are supplied on a non-SD contract.

You will need to take steps to obtain this information from your clients. The earlier that you do this, the earlier you will be able to ascertain what changes you may need to make to your charge rates and start negotiating these changes with your clients.

3. Contracts with your clients

Do your client contracts have variation provisions that will allow you to vary your charge rates?

In order to meet the cost of paying agency workers equal pay rates, it is likely that you will need to increase the charge rate to your clients.

Are any of your contracts with your clients for a fixed term?



If so, are you able to vary the charge rates during the term of the contract? If not, will the contract still be commercially viable after you take into account increased pay rates for your agency workers? If not, in the worst case scenario, do you need to consider terminating the contract and how much notice would you have to give?

4. Managing your agency workers

How many of your agency workers are engaged on SD contracts?

Some agencies may have minimum impact if only a small number of agency workers are engaged on SD contracts. A high number of workers engaged on SD contract will have a bigger impact.

Do your contracts contain terms that could potentially mean that there is an ongoing requirement to provide pay between assignments (because this remains a contractual requirement) even after the SD provisions of the AWR repealed from 6 April 2020?

If so, you may wish to consider amending these contracts ahead of 6 April 2020 so that it is clear the pay between assignments only applies in respect of the AWR and this will not apply after 6 April 2020.

Will you be able to provide ongoing work for your agency workers to meet any obligation to provide a minimum amount of work? Will your clients continue to provide sufficient work for you to meet these minimum hours?

All compliant SD contracts must contain a clause stating the minimum number of hours that the agency worker will be offered each week and this can be no less than one hour. This contractual clause will not automatically be repealed from 6 April 2020. As the contract is a contract of employment which by its nature means that there is an obligation on the employer to provide work, this is likely to be an ongoing requirement to provide some work to your agency workers.

How many of your agency workers who are presently employed on SD contracts have been employed for 2 years or more?

It is important for you to identify how many of your agency workers have completed 2 years' service as you will need to consider the implications that may arise if you are put in a position where you may need to terminate any agency worker's contract either before 6 April 2020, in order to put an alternative contract in place, or after 6 April 2020 if there is an impact on the amount of work that is available for your agency workers to do.

Under the Employment Rights Act 1996, you may only terminate an employee's contract of employment if the reason for doing so is fair. The 5 fair reasons for dismissal are as follows:

- Capability/performance;
- Conduct of the employee;



- Redundancy;
- The employee could not continue to work in the position which he held without infringement of a duty or restriction imposed by law; or
- For some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

How many of your agency workers have had the benefit of the rights set out in regulation 10 (1) (c) of the AWR (see out below) for at least a 4 weeks over the duration of their employment under the SD contract?

Regulation 10 (1) (d) of the Agency Worker Regulations states that you cannot end a SD contract unless you have satisfied the conditions under Regulation 10(1) (c) for an aggregate of not less than four calendar weeks during the contract.

The conditions set out in regulation 10(1) (c) are that during any time when an agency worker is not being supplied to a hirer:

- 1) The agency must take reasonable steps to seek suitable work for the agency worker;
- 2) If suitable work is available, the agency must offer the agency worker to be proposed to a hirer who is offering such work; and
- 3) The agency pays the agency worker a minimum amount of remuneration in respect of that period.

The problem is that in practice it may be difficult to comply with all of the above conditions, particularly because if you consistently have work to offer your agency workers, whilst conditions 1 and 2 will be satisfied, condition 3 will not be.

If you are in a position where you need to consider putting your agency workers onto a different type of contract before 6 April 2020, you cannot end the current SD contract without complying with the above obligations and you should also consider whether your agency workers have two years' service (see the *REC AWR Repeal of Swedish Derogation Contracts Guidance*).

5. Trade unions

Have you recognised any trade union(s) to represent your agency workers in terms of collective bargaining?

If so, you will need to engage with the trade union in respect of changes that you may wish to make to terms and conditions of your agency workers. Trade unions are likely to be keen to see an earlier cessation of the use of SD contracts.