



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

REC AWR repeal of Swedish derogation contracts guidance November 2019

Part one: Background and issues relating to the end of Swedish Derogation contracts

The Agency Workers Regulations 2010 (AWR) came into force in October 2011 and provide agency workers with the right to be engaged on terms, relating to certain employment rights, which are at least as favourable as the terms applicable to the staff of the client they are supplied to. These rights, often referred to as equal treatment, apply to agency workers once they've completed their qualifying period (see [REC AWR factsheet 3](#)).

Employment rights covered by the AWR

Equal treatment applies to the terms relating to:

- pay
- duration of working time
- night work
- rest periods
- rest breaks
- annual leave

However equal pay doesn't apply if an agency worker is engaged on a contract of employment that complies with all provisions of regulation 10 of the AWR. Such contracts are commonly referred to as 'Swedish derogation' contracts (SD contracts). One of the features of the SD contract is that the agency worker is entitled to pay between assignments in accordance with regulation 11 of the AWR.

Many agencies either chose, or were persuaded by their clients, to start using SD contracts to help manage the cost impact of equal pay when the AWR first came into force. In recent years though, these contracts have drawn increased criticism. Despite the fact that the SD contracts provide agency workers with employment on permanent contracts and full employment rights as well as guaranteed minimum hours, there has been some debate about the extent to which they have actually benefited from pay between assignments. As such, the SD contract became one of the areas that was reviewed as part of the [Taylor Review of Modern Working Practices](#) (*the Taylor Review*).

From 6 April 2020, regulations 10 and 11 of the AWR will be repealed. This will abolish SD contracts and give all agency workers who are employed on them the right to equal treatment pay rates along with all the other AWR rights that they already enjoy. This decision followed the [Government response to the Taylor Review](#) and a subsequent consultation on the use of SD contracts.



If you currently supply agency workers on SD contracts, or you are thinking of doing so, there are a number of things that you need to consider and steps to take ahead of next year's changes:

- Consider whether it make sense to continue to engage any further agency workers on SD contracts.
- Consider how to manage the application of equal treatment pay rates for agency workers from 6 April 2020.
- Alternatively, you may wish to take steps to end the use of SD contracts prior to the changes, either at the request of your clients or in order to manage a transition away from their use.

Conditions to be met for an SD contract to be valid

It's worth recapping on what makes a valid SD contract. Agency workers are entitled to equal pay unless all of the conditions in regulations 10 and 11 AWR are complied with for the duration of the contract. These conditions set out when the contract should be issued, the terms and conditions to be included in the contract and the strict conditions that must be met in order to end an SD contract. Any breach of these provisions means that the SD contract won't be valid and an agency worker will be entitled to equal pay for the entire period of their assignment with a client (after completion of the [qualifying period - REC AWR factsheet 3](#)). The details of these requirements are covered in more detail below.

Timing – when should the SD contract have been issued?

An SD contract must be agreed with the agency worker before the beginning of the first assignment that the agency worker carries out under it.

What terms and conditions must be included in the contract?

Regulation 10 (1) (a) requires the following to be included:

- a) The minimum scale or rate of pay, or the method of calculating the pay;
- b) The location or locations where the agency worker may be expected to work;
- c) The expected hours of work during any assignment;
- d) The maximum number of hours of work that the agency worker may be required to work each week during any assignment,
- e) The minimum hours of work per week that may be offered to the agency worker during any assignment provided that it is a minimum of at least one hour; and
- f) The nature of the work that the agency worker may be expect to be offered, including any relevant requirements relating to qualifications or experience.

Additionally, regulation 10(1)(b) requires the contract to include a statement that informs the agency worker that by entering into a SD contract, the rights relating to equal pay will not apply.

The contract must be a permanent contract of employment that provides for the agency worker to be paid between assignments.



How can an SD contract be terminated by an agency?

An agency cannot terminate an SD contract unless it has satisfied each of the following conditions, for at least four weeks over the duration of the contract:

As per AWR regulation 10(1)(c) during any period when the agency worker is not working but is available to do so, the agency must:

- a) Take reasonable steps to seek suitable work for the agency worker;
- b) If suitable work is available, offer the agency worker to be proposed to a hirer who is offering such work (that means offer to put the agency worker forward for the role with the hirer); and
- c) Pay the agency worker a minimum amount of remuneration in respect of that period. (The 'minimum amount' is a specific amount defined in regulation 11 AWR – see [REC AWR factsheet 7](#)).

Difficulties in ending a Swedish Derogation contract

In practice it may be difficult for the agency to comply with all of the above conditions, particularly if you have consistently had work to offer your agency workers. Whilst conditions (a) and (b) will be satisfied, condition (c) will not be.

Risks if there is a breach of AWR regulations 10 and 11

Any breach of regulations 10 and 11 of the AWR will mean that the SD contract is not valid. In the absence of an SD contract, an agency worker is entitled to equal pay as well as the other equal treatment rights from the point they complete the qualifying period. For the period of any assignments worked under the contract, if the agency worker has received less pay than the equal treatment pay rate, he or she would have a claim under the AWR for the difference in pay. This could amount to a significant sum particularly where the agency worker has been engaged on the contract for a long period of time and if the breach applies to a large number of agency workers.

From 6 April 2020, regulation 10 and 11 of the AWR will no longer apply, so these risks will fall away. But until that date, agencies need to ensure that their SD contracts remain compliant and no actions taken breach regulations 10 and 11.

How can an agency worker end an SD contract?

An agency worker is not required to comply with any provisions under the AWR to end the contract. However, they may be required to give notice when they resign from the contract, either the statutory notice of one week or longer if specified in the contract.



Part two: Employment Rights for agency workers on Swedish Derogation Contracts

Employment rights for agency workers on SD contracts

It is important to keep in mind that a compliant SD contract, unlike the more flexible contract for services commonly used for agency workers, is a contract of employment and gives those agency workers full employment rights because they are classed as employees.

An employed agency worker will have protection from unfair dismissal after two years' service meaning that their contract can only be ended if a fair legal reason to terminate the employment applies. Terminating employment is regarded as a dismissal. As well as a fair reason, the employer (the agency) must follow a fair procedure.

The fair legal reasons to end employment under the Employment Rights Act 1996 are as follows:

- a) Capability/performance of the employee;
- b) Conduct of the employee;
- c) Redundancy;
- d) The employee could not continue to work in the position which he held without breaching a statutory requirement or restriction imposed by law; or
- e) Some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held.

The end of SD contracts could result in situations where redundancies could arise or other difficulties which may give rise to SOSR grounds to terminate agency worker contracts. These two fair dismissal reasons are explained in more detail below.

Redundancy

Redundancy can apply where a business needs fewer employees to carry out work of a particular kind.

For example, if there are difficulties persuading a client to meet the additional cost of supplying workers on equal pay rates, clients could decide to reduce the number of agency workers they wish to use. Clearly, it would be in the interests of the agency to try to find their agency workers alternative clients to supply to. However, in the event that it is not possible to find alternative assignments with new clients, there may be no option but to make some redundancies. This would be a fair reason to terminate employment but it is also important that a fair procedure is followed. Depending on the number of redundancies to be made there may be more rigorous procedures to follow with strict rules about the method of consultation. See the [REC's redundancy guidance](#) for more information.

After two years' service, employees who are made redundant are entitled to a statutory redundancy payment.



Some other substantial reason (SOSR)

Another fair reason to terminate agency workers' contracts could be for SOSR. This is where the employer has a substantial reason that justifies the employer terminating a contract and covers reasons which do not fit in with the other four fair reasons stated above. For example:

- Being forced to move away from using an SD contract in favour of an alternative because of a change in legislation; which no longer makes that business model viable;
- If a client, sensitive to the criticism of SD contracts, decides ahead of the repeal date that they no longer wish to be supplied with agency workers on that type of contract and the contract between the agency and the client is genuinely under threat, the agency may have little choice other than to look at options to either put equal pay terms in place for the agency worker. This might necessitate the need for an alternative contracts to ensure the contract with the client remains viable. A termination of the contract may be necessary if it is not possible to agree the required contract variation with the agency worker.

Other employment rights

Transfer of Undertaking (Protection of Employment) Regulations 2006 – 'TUPE'

The TUPE provisions provide certain protection to employees if the business that they are working for is sold or otherwise transferred from one party to another.

The TUPE provisions also apply where:

- A business outsources services to a third party provider;
- A business which has already out sourced services to a third party provider, changes provider; or
- A business brings an outsourced service in-house.

If a client is using one employment business for the purpose of supplying staff and decides to use a different employment business to supply staff, this can give rise to a transfer that falls within the TUPE provisions.

As the TUPE provisions provide protection to employees (but not to those engaged on contracts for services), these provisions can become relevant where the staff that are being supplied to a client are engaged on employment contracts, such as a SD contract.

The protection given to employees allows them to transfer their employment to the new service provider, keeping the same terms and conditions and any continuous period of employment they have already gained.

There is a requirement for the outgoing service provider and incoming service provider to consult with any affected staff, with extensive penalties if there is a failure to do so. There is also a requirement for the outgoing service provider to share information with the incoming service provider about the terms and conditions on which the affected employees are engaged.

TUPE could apply when an agency takes over the supply of staff from another agency or when a client outsources its supply of staff or brings this back in-house. See the [TUPE section of the REC Legal Guide](#) for more information.



Part three: Repeal of Swedish Derogation contracts on 6 April 2020

SD contracts will not automatically end on 6 April 2020.

What are the options?

1. Take no action and allow your agency workers to remain on SD contracts beyond 6 April 2020

If you do decide to leave your agency workers on these contracts they will remain employed on the same terms as applied previously except they will be entitled to equal pay as per the AWR together with the other equal treatment provisions. Their SD contracts will not automatically end on 6 April 2020.

You will be required to provide your agency workers with a written statement on or before 30 April 2020 stating that:

- a) They are entitled to equal pay rights under the AWR; and
- b) The statement they would have been given in their original contract stating that they were not entitled to equal pay under the SD contract no longer applies.

You only need to provide this statement in respect of SD contracts that are **not terminated** on or before 30 April 2020.

Importantly, agency workers may also be entitled to ongoing pay between assignments if this entitlement is embedded as a contractual obligation and is not amended/removed.

Other provisions that form part of the contract, including the terms required for a valid SD contract (see '[What terms must be included in the contract?](#)' above) will also continue to apply after 6 April 2020 unless or until these provisions are amended. This includes the provisions relating to the minimum number of hours work that must be offered to your agency workers.

Any variation to an agency workers contract should be done with the agency worker's consent or in accordance with a variation clause in the contract. Do take advice before seeking to make amendments.

2. Terminate the SD contract before 6 April 2020 and move agency workers to a different type of contract

You may wish to consider amending or terminating SD contracts before 6 April 2020, however there are potentially significant risks in doing so. Regulation 10 of the AWR continues to apply until 6 April 2020, which means all of the rules outlined above (see the previous section, '[How can an SD contract be terminated by an agency?](#)') remain in place until then.

For agency workers who have received at least the 4 weeks' pay between assignments in line with regulation 10(1)(c), terminating the contract in order to offer an alternative contract has less risk.



However, unfair dismissal still needs to be taken into account for SD agency workers with 2 years' or more service. Terminating a contract even where another contract is offered could give rise to unfair dismissal claims.

Any SD agency workers who are moved to non-SD agency worker contracts will be entitled to equal pay rates in line with the AWR without having to wait until 6 April 2020 (provided they have completed the qualifying period – see [REC AWR factsheet 3](#)).

3. Resignation of an agency worker and the offer by an agency of an alternative contract before 6 April 2020

While there are risks for agencies if they seek to terminate or amend existing SD contracts, these risks don't apply if an agency worker voluntarily ends their own contract.

Agencies may want to consider offering their existing SD contract agency workers an alternative contract such as a contract for services or another employment contract which does not include pay between assignment provisions.

Agencies workers can choose to terminate their own contract, if they wish to take up the alternative contract. There is an incentive for agency workers to accept an alternative agency worker contract where the offer is made well ahead of the 6 April 2020 because, assuming they have completed their qualifying period, they will immediately benefit from equal pay rates rather than having to wait for this to become a legal requirement.

It possible to manage a transition from SD contracts to another type of contract in this way but it is crucial that any decision to terminate the contract by the agency worker is entirely voluntary. If you are looking at this as an option, it must be managed carefully; you should seek specific advice about your position. In some circumstances, using a legal agreement known as [settlement agreement](#) may be advisable to minimise risk.



Part four: Other actions

Talk to your clients

Are your clients aware of the impact of the changes?

It is important that they are aware of the changes. Agency workers will be entitled to pay rates which are at least the same as what they would be paid if they were engaged directly by the client from 6 April 2020 (or earlier if they are supplied under a non-SD agency worker contract before the repeal date). Inevitably, charge rates will need to be increased to meet the additional pay rate for staff.

Agency workers who are on assignments and who have already completed their qualifying period (see [REC AWR factsheet 3](#)) will immediately be entitled to equal pay rates.

If your clients' staff have more generous holiday entitlement than the statutory minimum (28 days) your agency workers will be entitled to the additional holiday pay if they currently only receive payment for 28 days leave.

Some REC members have indicated that their clients are keen for them to cease using SD contracts ahead of the repeal date. Find out whether this is something that your clients are also keen to do.

Information required

- You will need to gather information from clients about the equal pay rates that your agency workers will be entitled to if they remain on the same assignments.
- Check the terms and conditions of your client contracts. Is there a provision that allows you to vary the charge rate to take into account the equal pay rates that your agency workers will be entitled to?
- Are you able to negotiate a new charge rate?
- Do you have fixed term contracts with your clients to supply staff? Does the contract allow you to vary charge rates during the term of the contract? If not, will the contract remain commercially viable on the current charge rates? In a worst case scenario (e.g. if your client refuses to vary the charge rate) will you need to terminate the client contract and if so what notice, if any will you need to give your client?

Assessing your agency workers

- How many agency workers do you have engaged on SD contracts?
- How many clients do you supply SD agency workers to?
- How many of those workers have had at least 4 weeks of pay between assignments over the course of their contracts?
- How many agency workers have at least two years' service and are protected from unfair dismissal?



- Have you recognised any trade union(s) to bargain on behalf of your agency workers? If so, early engagement here could be helpful as they may be keen to move agency workers off SD contracts sooner rather than later.

Working with umbrella companies/other intermediaries?

If you use umbrella companies or other intermediaries who engage the agency workers that you supply to your clients, it could be that they have been using SD contracts either with or without your knowledge. They have similar obligations to those of agencies under the AWR in terms of the obligation to ensure that agency workers receive equal treatment rights. From 6 April 2020 those rights must include equal pay and if this is not put into place, liability could potentially rest with any of the umbrella company/intermediary, agency or client.

If the umbrella company/intermediary you work with is using SD contracts, you must satisfy yourself that they will be applying equal pay from 6 April 2020.

See [REC AWR factsheet 5](#) for information on liability for breach of the AWR.

Amending your contracts

If your SD contract gives rise to a contractual right to pay between assignments as required to comply with regulation 10 of the AWR, agency workers could potentially argue that this obligation could continue beyond 6 April 2020. It would be prudent to take steps to amend agency workers contracts ahead of the repeal date to make it clear that the pay between assignments applies only in regard to the obligation in regulation 10 of the AWR, to remove any doubt about the obligation ending on 6 April 2020.

Changing working hours

One of the conditions required for a valid SD contract is that details of the minimum and maximum hours of work must be set out in the contract. If your clients are no longer able to provide similar amounts of work following the 6 April 2020 changes, it may be necessary to vary the relevant terms and conditions in your agency worker's contract. The contract will need to be varied with the agency worker's consent where there is no express provision allowing for variation of the contract.

This guidance document will help you to prepare for the repeal of Swedish derogation contracts. Please also see the *REC Checklist for agencies November 2019*.

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