

AWR Factsheet 6- Maternity rights under the Agency Workers Regulations

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Factsheet summary

The Regulations give agency workers with the right to equal treatment in terms of pay, working conditions, access to client on-site facilities and job vacancies. Additionally the Regulations make changes to existing employment legislation to extend some maternity rights to agency workers, which presently only apply to employees. In this Factsheet, we look at the maternity rights that the Regulations introduce for agency workers and the implications for agencies.

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1. Introduction to the Agency Workers Regulations 2010

The Agency Workers Regulations 2010 came into force in England, Scotland and Wales on 1 October 2011. The Agency Workers (Northern Ireland) Regulations 2011 came into effect in Northern Ireland on 5 December 2011. In this Factsheet we use the term “the Regulations” to refer to both sets of regulations. Save for the commencement dates, the Regulations are the same in all of England, Scotland, Wales and Northern Ireland.

The Regulations give agency workers the right to the same basic working and employment conditions they would receive if they were engaged directly by an end user client to do the same job; this is limited to conditions that relate to pay and working time. Agency workers are also entitled to access facilities and amenities that an end user client provides to its own workers and to be advised by a client of vacancies which arise in the client’s* business (* the term “hirer” is used in the Regulations to mean the entity using the services of the agency worker. We use “client” throughout the Factsheets).

This factsheet is the sixth in a series of 7 which will look at the Regulations in detail. They have been written for REC Members that operate as employment businesses.

For the purpose of this Factsheet “agency” means an employment business (which engages workers and supplies them to a client to work under the clients control and supervision). Employment agencies in the strict legal sense, which introduce candidates to a client to be engaged directly by that client, are not affected by these Regulations.

A reference to an agency worker means the individual engaged by the agency and supplied to work for the client under the client’s supervision and control (for further details on who is an agency worker see Factsheet 1).

For the purposes of these factsheets, “the Guidance” means the guidance on the Regulations produced by the Department of Business, Innovation and Skills (BIS) which can be downloaded [here](#) or the guidance on the Northern Ireland Regulations produced by the Department of Employment and Learning (DELNI) available [here](#). References to “the Guidance” are to both guidance documents.

2. Paid time off to attend ante-natal appointments

2.1. The entitlement

A pregnant agency worker is entitled to take paid time off work to attend ante-natal appointments when advised to do so by a GP or midwife and once she has completed the 12 week qualifying period.

However, if the agency worker is an employee of the agency (i.e. she is engaged under a contract of employment such as the Regulation 10 contract ("Swedish Derogation" contract) or a zero hours contract) rather than working under a contract for services, she will already be entitled to the right to reasonable paid time off to attend ante-natal appointments because she is an employee.

2.2. How much time off is the agency worker entitled to?

A pregnant agency worker who has completed the 12 week qualifying period, is entitled to take "reasonable" paid time off from her "working hours" to attend ante-natal appointments. These appointments must be on the advice of a registered medical practitioner (e.g. GP), registered midwife or registered nurse. The agency and client can ask for proof of such appointments and can request to see:

- a certificate from a registered medical practitioner, registered midwife or registered nurse stating that the agency worker is pregnant; and
- an appointment card/ other document regarding the ante-natal appointment in question.

However, such proof is not required for the first appointment as this is usually the appointment which confirms the pregnancy.

2.3. What is "reasonable" paid time off?

The Regulations do not expressly say what reasonable time off would be but the REC's view is that it would include the time needed for the agency worker to travel from their place of work to the ante-natal care appointment, together with the time taken to attend the appointment and to return to work. An agency can ask for proof of any appointments (after the first appointment). This should provide an indication of the location of the appointment and the agency will then be able to make an estimate of what this "reasonable" time off will be.

2.4. Can the agency ask the agency worker to schedule her ante-natal appointments for either the beginning or end of her working day?

An agency can enquire whether this would be possible but should not refuse the agency worker time off to attend or refuse to pay her for the time needed to attend if she cannot do this. An agency will need to take care to ensure that it does not unreasonably prevent an agency worker from taking time off to attend her ante-natal appointments and that it pays her in accordance with the Regulations for her time off. The agency worker will be able to seek a remedy against the client or hirer if either prevents her from exercising her right to take time off from an assignment (see [Factsheet 5](#)).

2.5. How much is the agency worker entitled to be paid?

The agency should pay the agency worker for time that she has to take off from an assignment in order to attend her ante-natal appointment. The Regulations provide that the hourly rate of pay is to be calculated by dividing a week's pay by the number of hours worked in a normal working week for that worker (based on the terms that apply to the assignment the agency worker is working on at the time of taking the ante natal appointment). If the agency worker's hours fluctuate each week, the calculation will be based on the average number of hours worked over the preceding 12 weeks.

Issues for the agency

As stated above, an agency will need to take care to ensure that it does not unreasonably prevent an agency worker from taking time off to attend her ante-natal appointment and that it pays her in accordance with the Regulations for her time off. The major issue with this new right is likely to be agency worker's entitlement to be paid for the time off. This is a cost that the agency will not automatically be able to recover from the client and is also one which cannot necessarily be built into the charge rate in the same way as holiday pay for example.

An agency will fall foul of the new provisions if it seeks to avoid liability to pay an agency worker when she attends her appointment by rearranging the times that she would otherwise be asked to work on an assignment. In practice, most women are required to attend a limited number of ante-natal appointments and may receive long notice. It may be difficult to identify what an agency worker's "working time" will be in some cases.

Example 1

An agency worker in a long term office based assignment, whose working hours over the assignment are typically 9am to 5pm, notifies her agency that she has an ante-natal appointment in the morning between those hours. If the agency advises that worker that she is not needed that day, or that she can start later and make up the hours, this is likely to strongly suggest that arrangements have been made to avoid paying the agency worker as required.

Example 2

An agency worker in a long term assignment, in which she works any of the client's three shifts each day, is required to contact the agency to advise it of her availability each week and to receive notice of the shifts she will be working the following week. If the agency worker has previously notified the agency of her forthcoming ante-natal appointment in the following week, and she is allocated a shift which allows her to attend the appointment without having to take time off, it may be difficult to say that the agency has deliberately placed her in a shift to avoid paying her for taking time off.

2.6. What rights does an agency worker have to accompany a pregnant woman to an ante-natal appointment?

The right to accompany a pregnant woman to an ante-natal appointment came into effect on 1 October 2014. Further information on an agency worker's right to accompany a pregnant woman to an ante-natal appointment is set out in the REC [Right to accompany a pregnant woman to an ante-natal appointment factsheet](#).

3. The right to be offered alternative work

3.1. The entitlement

The Regulations require an agency to offer a pregnant agency worker suitable alternative work if her current assignment becomes unsuitable on maternity grounds. This means that where an agency worker's assignment is ended on maternity grounds, the agency will be required to offer to put her forward for another suitable assignment which does not involve the same health and safety risks. The agency worker must complete the 12 week qualifying period in order to have this entitlement.

3.2. What is meant by ending the supply of the agency worker on maternity grounds?

This will mean that the supply of the agency worker to the client is ended on the ground that the agency worker is:

- pregnant;
- has recently given birth; or
- is breast-feeding a child.

The most common reason that the assignment of the agency worker will need to be terminated on maternity grounds will relate to health and safety risks in the current assignment. For example, the assignment may involve the agency worker working with chemicals, involve heavy lifting or operating heavy machinery. In the first instance the agency and the client should determine whether there are any adjustments that can be made to the role in order to remove the health and safety risks as they have joint responsibility for health and safety in a shared workplace. Additionally, an agency employment business would be obliged under the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Conduct Regulations) to take such steps to ensure that working in the assignment will not be detrimental to the interests of the agency worker or the hirer. However, if it is not possible to remove such risks, the assignment would need to be terminated on health and safety grounds.

Please note that assignments must not be terminated just because the agency worker is pregnant. This could amount to direct discrimination on the grounds of pregnancy or maternity.

3.3. What is a suitable alternative assignment?

Where the agency has terminated an assignment on health and safety grounds related to pregnancy or maternity, it is required to find a suitable alternative assignment for that agency worker.

A suitable alternative assignment would be one which is free of the same health and safety risks which caused the original assignment to be terminated and would involve work which is appropriate for the agency worker to do in her circumstances. Additionally the terms and conditions which apply to the alternative role must be at least as favourable as those which applied to the terminated assignment. On the face of it this would suggest that just the pay

rate of the alternative assignment would need to be similar to the original role, but other terms would also need to be taken into account; e.g. working hours, location etc.

3.4. How long will an agency be required to continue to supply an agency worker in an alternative role?

This particular obligation will only apply for what was the intended duration of the terminated assignment. Of course, it will not always be the case that a client has provided a specific end date for an assignment, so where the particular end date is not known, the agency's obligation will continue until what would be the anticipated end date. Again this may not be entirely clear and agencies should obtain as much information as possible from the client.

3.5. What if it is an "on-going assignment"?

Separate to the Regulations, agencies are required under the Conduct Regulations to obtain information from the client regarding the duration, or likely duration, of the assignment and ensure that this has been confirmed in writing to the agency worker, so an agency should already have requested and received this information. An assignment should not just be left as "on-going" or "open-ended" because this would be a breach of the Conduct Regulations. If an agency does not know what the likely duration would be, then this should be confirmed from the client.

3.6. Payment for the agency workers if no alternative role is available

If an agency has terminated an worker's assignment is ended on maternity related grounds, and the agency is not able to find an alternative assignment which meets the criteria set out in section 3.3, the agency will be required to pay the agency worker for the duration of the terminated assignment. Again, as above if the end date of the assignment is not known, the agency will be required to pay the agency worker for what would have been the likely duration of the terminated assignment.

3.7. How much pay is the agency worker entitled to?

The agency worker is entitled to receive a week's pay for each week she is not able to work in the terminated assignment as above. A week's pay is the amount that the agency worker would have received under her contract with the agency if her original assignment had not been ended on maternity grounds. Unfortunately the Regulations provide no further information about how this should be calculated if the hours available in the assignment are likely to fluctuate from week to week.

3.8. Are there circumstances in which the agency worker will not have to find a suitable alternative assignment or pay the agency worker?

If the agency worker gives notice* to the agency that she no longer wants the agency to continue providing work-finding services to her, the agency will no longer need to source suitable alternative assignments for her. *We recommend obtaining such notice in writing.

Also if an agency offers to put the agency worker forward to a client for a suitable alternative role and the client accepts the worker for the assignment, the agency will not be required to pay the agency worker if she turns the assignment down “unreasonably”. There will be circumstances in which it will be more straightforward to show that the agency worker has “unreasonably” rejected an alternative assignment, for example where the terms are identical with no great difference in location. In other cases this may be more difficult to determine. However if the agency has taken clear details from the agency worker at the registration stage as to the type of work she wishes it to find for her, the agency should have a good argument regarding suitability of roles if the work falls within the similar description and the terms are not substantially less favourable, and if the work is not unsuitable from a health and safety point of view.

3.9. What other issues will agencies need to consider?

An agency will have difficulties if it identifies a suitable alternative assignment and offers the agency worker to a client, which then declines to accept the agency worker in that assignment. The agency will still have to pay the agency worker if it cannot find another suitable assignment for her. Clients will need to take care though, not to discriminate against an agency worker by unlawfully refusing to accept her for an assignment.

Suitable alternative assignments will be more or less difficult to find depending on the sectors in which the agency operates. For example, where the type of work she is doing, does not inherently give rise to health and safety risks which would lead to termination of an assignment on maternity grounds, agencies should more easily be able to source alternative assignments. It may be that in these cases risks arise because of the nature of a client’s site for example. In other sectors, for example, agencies that supply radiographers or airline cabin crew, where risks are common for specific roles because of the nature of the work, sourcing alternative work which is suitable for the agency worker to do, will be more difficult.

The Regulations do not introduce any new steps that agencies and clients should take to identify health and safety risks which arise in connection with maternity. As previously stated, the Conduct Regulations already require agencies to obtain health and safety information

from clients and to withdraw an agency worker from an assignment when information is received which leads the agency to conclude that the agency worker is not suitable for the role.

The real issue to tackle here will be the duty to find alternative work in order to limit the cost of paying the agency worker while she is not in an assignment. In some respect agencies should be in a better position to do this than employers are when dealing with their own directly employed staff who work purely in their undertaking. By contrast, agencies are in the business of finding work and should have a range of clients to which the agency worker can be supplied.

In addition agency workers who are engaged on a contract for services or a contract of employment may be entitled to receive Statutory Maternity Pay from the agency (subject to satisfying the qualifying criteria). Further information is available from the [REC Legal Guide](#).

However, if the agency worker is engaged on a contract of employment, they will also be entitled to Statutory Maternity Leave. Further information is available from the [REC Legal Guide](#).

REC Legal

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AWR Factsheets

- Factsheet 1: An introduction to the Agency Workers Regulations
- Factsheet 2: The application of the Regulations to limited company contractors
- Factsheet 3: How does an agency worker qualify for equal treatment?
- Factsheet 4: What is equal treatment?
- Factsheet 5: Liability for breach of the Agency Workers Regulations
- Factsheet 6: Maternity rights under the Agency Workers Regulations
- Factsheet 7: The “Swedish Derogation” - Employed agency workers – when does equal treatment not apply?

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