AWR Factsheet 7- Employing agency workers on a Swedish Derogation contract - when does equal treatment not apply?

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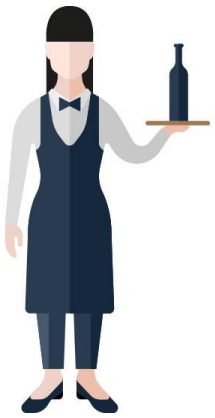

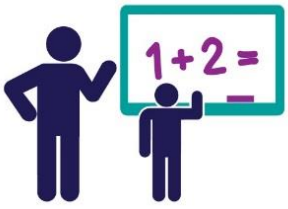

REC Legal

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Factsheet summary

As set out in previous Factsheets, under the Agency Workers Regulations (AWR) agency workers are entitled to new rights to receive equal treatment in respect of pay, conditions relating to working hours, access to a client's collective facilities and the right to be informed of vacancies at a client.

However, agency workers who are engaged by an agency under a specific type of employment contract are not entitled to equal pay (though they will be entitled to the remaining equal treatment rights). This is sometimes referred to as the "Swedish derogation" or "pay between assignments" contract. This Factsheet will look at what rights employed temps will have and what contractual conditions must be met to exclude them from the equal pay provisions of the AWR.

Importantly these contracts now have a limited shelf life. The Government announced in December 2018 that it will abolish these contracts from 6 April 2020. Agencies should bear this in mind, particularly when looking at the obligations these contracts impose, when considering whether to engage agency workers on new pay between assignments contracts. More detail is given in the relevant sections.

All references, figures and hyperlinks are correct at the time of writing.

Contents:

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 "AWR" to refer to both sets of regulations. Save for the commencement dates, the AWR are the same in all of England, Scotland, Wales and Northern Ireland.

The AWR 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 collective facilities 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 AWR to mean the entity using the services of the agency worker. We use "client" throughout the AWR Factsheets).

This Factsheet is the final in a series of 7 which look at the AWR in detail. They are written for REC Members that operate as employment businesses (organisations which engage workers and supply them to a client to work under the clients control and supervision).

For the purpose of this Factsheet "agency" means an employment business. 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 AWR.

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 AWR Factsheet 1).

For the purposes of these factsheets, "the Guidance" means the guidance produced by the Department of Business, Energy and Industrial Strategy (BEIS) or the guidance on the Northern Ireland Regulations produced by the Department of Employment and Learning (DELNI). References to "the Guidance" are to both guidance documents.

2. Employing agency workers

Most agencies engage their agency workers under a contract for services rather than on contracts of employment. As workers they are entitled to receive the National Minimum Wage, paid annual leave, certain statutory payments such as statutory maternity pay or sick pay, pensions auto-enrolment (subject to meeting the relevant criteria), and protection from discrimination. However agency workers who are not employees do not enjoy the full range of employment rights which include:

- maternity, paternity and adoption leave;
- paid time off to attend ante-natal classes (although this right has been extended to qualifying agency workers under the AWR in any case- see AWR Factsheet 6);
- time off to deal with family emergencies;
- protection from unfair dismissal;
- statutory minimum notice periods on termination of employment;
- the right to a statutory redundancy payment when the employee is made redundant;
- the right to be paid by the employer when undertaking health and safety training.

That said, some agencies engage their agency workers under a contract of employment rather than a contract for services. Typically, an employed agency worker is only required to attend work on a client's site as and when work is available, and will only be paid for time actually worked on an assignment. When no work is available, the contract terms will normally mean that the agency worker is not entitled to be paid. Although an employment contract does not offer the same degree of flexibility as a contract for services, the types of employment contract which agencies currently use will, as far as possible, provide some degree of flexibility to cope with fluctuating client demand.

There are various types of employment contracts on which agencies can employ agency workers. These include:

- a permanent contract (i.e. with no defined end date)
- a fixed-term contract (i.e. with a defined end date)
- a zero hours contract (i.e. with no guaranteed hours)
- an annualised contract (i.e. with guaranteed minimum hours over one year)
- a fixed hours contract (i.e. with set hours)
- an AWR Regulation 10 contract (aka "Swedish derogation" or "pay between assignments" contract)

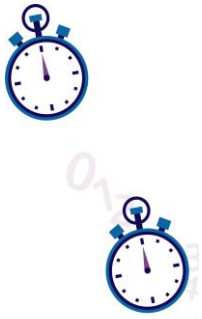
3. Employing agency workers under an AWR Regulation 10 contract

3.1. No entitlement to equal pay

If an agency engages an agency worker under a permanent contract of employment that complies with the provisions set out in Regulation 10 of the AWR (see section 4.1), that agency worker will not be entitled to equal pay. However s/he will still be entitled to equal treatment in respect of the terms relating to the other basic working and employment (duration of working time, night work, rest periods, rest breaks and annual leave). Additionally agency workers will continue to have the benefit of the "day one" rights: access to the collective facilities (such as canteen or childcare facilities or transport services facilities) provided by clients to their own staff and the right to be informed of relevant vacancies that the client has (for further details see AWR Factsheet 4).

3.2. Abolition of Swedish Derogation contracts from 6 April 2020

Since their inception there has been a lot of discussion about the legitimacy and (mis)use of Swedish Derogation/ pay between assignments contracts. In December 2018 the Government published the Agency Workers (Amendment) Regulations 2019 which will apply from 6 April 2020.[1] Regulation 3(4) of those regulations provides for the repeal of AWR Regulations 10 and 11 with effect from that date (i.e. those provisions within the AWR which set out the requirements of a Swedish Derogation/ pay between assignments contract). This will effectively abolish Swedish Derogation contracts which will mean that all agency workers will be entitled to equal pay on completion of the 12 week qualifying period. At the time of writing we are waiting for guidance on how agencies should manage their employed agency workers in anticipation of the abolition of these contracts. We will advise members as soon as possible.



All comments regarding the benefits and obligations under these contracts should now bear in mind the abolition of the contracts.

[1] These amending regulations will apply in England and Wales only. We wait to see what will happen in Northern Ireland and Scotland.

3.3. Other amendments to the AWR from 6 April 2020

The Agency Workers (Amendment) Regulations 2019 make some further amendments to the AWR:

- An agency worker on an AWR Regulation 10 contract will be entitled to receive a written statement from the temporary work agency (TWA) (which could be an agency or an umbrella company) confirming that from 6 April 2020:
    - the agency worker is entitled to equal pay subject to completion of the qualifying period; and
    - the original statement in AWR Regulation 10(1)(b) (which states that the agency worker is not entitled to the rights conferred by AWR Regulation 5 in relation to equal pay) no longer has effect.[2]

- If the TWA does not provide this written statement the agency worker can bring a claim to an employment tribunal.[3]

- The agency worker has a right not to be subject to a detriment (including dismissal) for a reason connected with these new regulations. S/he will be unfairly dismissed if dismissed for one of the following reasons:

(a) that the agency worker—
(i) brought proceedings under these Regulations;
(ii) gave evidence or information in connection with such proceedings brought by any agency worker;
(iii) otherwise did anything under these Regulations in relation to a temporary work agency or other person;
(iv) alleged that the temporary work agency which is the employer of the agency worker has breached these Regulations;
(v) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or

[2] Regulation 4(1) and (2) of the Agency Workers (Amendment) Regulations 2019 (Requirement to Provide written statement)
[3] Regulation 4(3) of the Agency Workers (Amendment) Regulations 2019 (Requirement to Provide written statement)

(b) that the temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).[4]

- Subject to certain exceptions, the AWR will continue to apply to any complaints which relate to relevant breaches that took place before the Regulations came into force.[5]

- The Secretary of State will review these Regulations at intervals not exceeding five years (the first review is due by 6 April 2025).[6]

4. Conditions applicable to an agency worker's contract of employment

4.1. Contractual terms

In order for an agency worker not to be entitled to equal pay s/he must be employed on a contract of employment which meet the requirements of Regulation 10. These include:

- the minimum scale and rate of pay and how this will be calculated;
- the location or locations where the worker will be expected to work;
- the expected hours of work during any assignment;[7]
- the maximum hours per week the worker may be required to work during an assignment;
- the minimum hours per week that the agency will offer the agency worker during an assignment, but this must be at least one hour (a contract under which a worker might be given no hours in any given week (such as a zero hours contract) will not comply with Regulation 10);
- the type of work that the agency will offer the worker and details of any experience or qualifications required; and

[4] Regulation 5 of the Agency Workers (Amendment) Regulations 2019 (Unfair dismissal and the right not to be subjected to detriment)
[5] Regulation 7 of the Agency Workers (Amendment) Regulations 2019 (Saving provision)
[6] Regulation 9 of the Agency Workers (Amendment) Regulations 2019 (Review)
[7] In October 2018 the Employment Appeal Tribunal found that the AWR Regulation 10 contracts of a number of agency workers were not valid because they did not sufficiently set out the expected hours of work. The workers concerned were employed by an umbrella company which was a temporary work agency for the purposes of the AWR. Its contracts provided that the workers could expect to work 5 days out of 7. The Employment Tribunal found (and its judgment was upheld by the EAT) that this was insufficiently clear for the agency workers to know how much work they would get. *Twenty Four Seven Recruitment and Others v Afonso and Others* [2018] UKEAT 0311/17.

- a provision that warns the agency worker that by entering into the contract of employment, the rights relating to equal pay under the AWR will not apply.

4.2. Starting a Regulation 10 contract

The agency worker must enter into the contract before the first assignment under that contract commences in order for the agency worker not to be entitled to equal pay.

The BEIS guidance makes no specific reference to the commencement of the contract but does say that "*the agency worker must be given a permanent contract of employment with the TWA and agree the terms and conditions that will apply across assignments and the level of pay between these assignments*."

We have identified three levels of risk relating to the enforceability of AWR Regulation 10 contracts, depending on when the contract is entered into:

1. **Low Risk** - wait for the agency worker's current assignment to terminate before employing them under the AWR Regulation 10 contract before commencing a new assignment;

2. **Medium Risk** – terminate the agency worker's current assignment and terms of engagement and re-engage them under the AWR Regulation 10 contract;

3. **High Risk** – allow the agency worker's current assignment to continue but vary the terms of engagement by requesting or requiring them to enter into an AWR Regulation 10 contract.

REC recommends that agencies which engage agency workers on an AWR Regulation 10 contract, do so once they are out of assignment but before a new assignment commences. This ensures a clean break and compliance with AWR Regulation 10. Approaches 2 and 3 above are risky because the agency worker could potentially argue that the contract was not entered into before the "first assignment" and that therefore s/he is still entitled to equal treatment in relation to pay under the AWR.

Bray and others v Monarch Personnel Refuelling (UK) Limited (ET/1801581/2012)

In one of the first recorded cases on the AWR 2010, an Employment Tribunal gave their view of "flipping" agency workers onto a Regulation 10 contract. Further detail is available in the January/ February 2013 Legal bulletin.

The case involved a group of Claimants, all drivers supplied by Monarch (M) (a temporary work agency as defined under the AWR) predominantly to one particular client. In the lead up to the AWR coming into force on 1 October 2011, the client advised M that all existing assignments would end by 30 November and that further assignments from 1 December would only be available to drivers engaged under a Swedish Derogation Contract. M consulted with its drivers during October and sought confirmation of whether they would accept a Swedish Derogation Contract. All of the Claimants agreed to do so, but one, H, requested a further meeting once the contract was issued. The contract itself was issued to the Claimants on 15 November 2012 with the same date. All of the Claimants, again with the exception of H signed and returned their contracts to M by 29 November.

On 1 December, all of the Claimants, including H turned up at the client depot for their assignments. H did not sign his contract until a couple of weeks later. Following queries raised by the Claimants about the effect of their contracts they subsequently issued claims in the Employment Tribunal for pay parity under the AWR, disputing that the Swedish Derogation Contracts were compliant with Regulation 10.

In this case, the Tribunal held that the new employment contracts were valid under the Swedish Derogation rules as they had been entered into before the beginning of the first assignment. Even if the new contract had not been signed, it was sufficient for the claimants to have received the relevant terms and conditions in writing several days before the assignment began under the new contract.

(Interestingly this case was referenced in the Government's Impact Assessment on the Repeal of the Swedish Derogation.)

4.3. Can an AWR Regulation 10 contract be for a fixed term?

No, in order for the principle of equal pay not to apply, the AWR Regulation 10 contract must be a permanent one i.e. it cannot be for a fixed period with a specified end date.

4.4. Can an AWR Regulation 10 contract contain a probationary period?

An AWR Regulation 10 contract can contain a probationary period, just as any other contract of employment can. However, whilst an employee may have reduced contractual rights during their probationary period, for example a shorter contractual notice period or restrictions on taking holiday, this will not affect their status as an employee and they will still be entitled to their statutory rights as employees. A common misconception is that, if the employee in his/ her probationary period is found to be unsatisfactory, his/ her employment can be terminated without the normal risks of wrongful or unfair dismissal. For example, an employee in their probation period is still entitled to protection from wrongful dismissal or can still qualify for protection from unfair dismissal (subject to satisfying the requisite length of continuous employment). The REC's Model Contract 14 (model AWR Regulation 10 contract) includes a probationary period at clause 3.1.

4.5. Can a temporary worker be engaged on a Regulation 10 contract and on a contract for services at the same time?

This is an interesting question and one for which we do not have a definitive answer – ultimately the matter may be tested in an Employment Tribunal. In theory, it may be possible to engage an individual on two separate contracts but there would be no practical benefit to the agency for doing this. If an agency worker is employed on an AWR Regulation 10 contract, they must either always have suitable work or be paid between assignments where there is no suitable work, until such time as that contract is terminated. An agency could not supply an agency worker on an AWR Regulation 10 contract, and then between assignments argue that the contract for services applies. To do this would completely undermine the AWR Regulation 10 contract and could expose the agency to retrospective equal pay claims for agency workers arguing that the AWR Regulation 10 contract was invalid.

5. The agency's obligations to pay agency workers between assignments and find alternative suitable roles

5.1. The obligation

An agency that employs its agency workers on AWR Regulation 10 contracts has two specific additional obligations to those workers in order to comply with AWR Regulation 10:

1. if no work is available and the agency is unable to place the agency worker in an assignment, the agency will be required to *"…take reasonable steps, to seek suitable work for the agency worker … [and] to offer the agency worker to … a hirer who is offering such work;"* [8] and

2. when suitable work is not available for the agency worker, the agency must pay the agency worker a minimum amount of pay [9](see section 7 below).

5.2. What is suitable work?

Agencies should agree with the agency worker what "suitable work" is and the locations of such suitable work - this should be stated in the contract of employment. "Suitable work" should be defined as widely as possible to give the agency sufficient scope to find appropriate assignments but agencies must be reasonable in terms of how far in terms of length or duration of any travel they would expect the agency worker to take to and from assignments. Importantly, the obligation to pay between assignments will not apply where the agency worker has unreasonably refused suitable work. There is no statutory definition of "reasonable" so the agency and the agency worker should understand at the outset what this could be. Ultimately, in the case of a dispute, and if the agency worker raised a claim, it would be for the employment tribunal to decide the matter.

At the time of writing we are not aware of any cases that have tested this point.

[8] Regulation 10(1)(c)(i) and (ii)
[9] Regulation 10(1)(c)(iii)

5.3. Can agency workers on an AWR Regulation 10 contract work for more than one client?

Yes, the AWR Regulation 10 contract does not restrict the agency worker to only working for one client. The only parties bound by the AWR Regulation 10 contract are the employer (the agency) and the employee (the agency worker) - the client is not a party to the contract. Therefore, as long as the work with the different clients constitutes "suitable work" in line with AWR Regulation 10(1)(c), the agency workers can work for more than one client.

6. Terminating a Regulation 10 contract

6.1. Avoiding unfair and wrongful dismissal claims

Importantly, an agency cannot terminate an agency worker's contract of employment, until it has met the obligations set out in section 5.1 for at least four weeks during the course of the contract.[10] This will be an issue for agencies if the agency worker has never been out of work and therefore the agency has not had to pay the agency worker pay between assignments.

When terminating the contract an agency must also consider the other employment rights that may apply to the agency worker. For example, employees have protection from unfair dismissal after 24 months' service (in certain specified circumstances 24 months' service is not required). Where this applies, the agency must have a fair reason to terminate the agency worker's contract and follow a fair procedure to avoid an unfair dismissal claim. For further information see the unfair dismissal section of the REC Legal Guide.

Employees will also be entitled to at least the statutory minimum notice of termination.

If the employee has a probation period in the contract the agency must still comply with the obligations above before being able to terminate the contract.

See also section 3.3 regarding unfair dismissal under the Agency Workers (Amendment) Regulations 2019.

[10] AWR Regulation 10(1)(d)

6.2. Notice to terminate

Another issue to consider when dealing with the termination of the AWR Regulation 10 contract is whether the employing agency has complied with its obligations to pay between assignments for the period of four weeks during the course for the contract and to ensure the employee receives the correct notice to terminate the contract of employment. In addition, does the final week of pay between assignments can count towards the notice pay that the employee will be entitled to? We deal with this in Note 42 of REC Model Contract 14 (the AWR Regulation 10 contract) which is copied below:

> *"The notice periods to be given by the Company to terminate the employment as set out in clause 13.1 represent the statutory minimum under section 86 *of the Employment Rights Act 1996 ("ERA") **plus one week** (Option A) or statutory minimum only (Option B).*
>
> *Whilst the employment business is likely to want to provide the absolute minimum notice to the employee, in the event that the reason for the termination is a lack of available work for the employee to carry out (and indeed no work can be located for the notice period) and the employer only provides statutory minimum notice under the contract, under section 87(1)* ERA the employee will be entitled to be paid **full pay** for his/her normal working hours (or average working hours over the last 12 weeks if s/he does not have normal working hours) **for the duration of the statutory notice period**. In order to avoid the application of section 87(1) of ERA the employer must provide at least one week's additional notice on top of the statutory minimum under section 86 ERA (the rationale for the inclusion of Option A). This has the effect of disapplying section 87 and in circumstances where there is no work for the employee to carry out during the notice period under this contract the employer will then be required to pay the employee at the usual "pay between assignments" rate (see definition of Minimum Pay in clause7.3) during the notice period i.e. effectively 50% of basic pay.*
> ** In Northern Ireland the equivalent references are sections 118 and 119 of the Employment Rights (Northern Ireland) order 1996.*
>
> *In the vast majority of termination scenarios the employment business will be obliged to pay the employee less notice pay using the statutory minimum notice plus one week arrangement even where the employee has already received the four Calendar Weeks' pay between assignments during the contract. **However where the employee has a pay rate***

which is at or very near the rate of the National Minimum Wage it may be more onerous on the employment business if Option A is selected."

See the REC Legal Guide for the statutory minimum notice periods and REC Model Contract 14 (The AWR regulation 10 contract).

6.3. Gross misconduct and the obligation to pay between assignments for a minimum of 4 calendar weeks

There is an interesting question about whether the obligation to pay between assignments for at least four weeks during the contract must still apply if the agency worker has committed gross misconduct and the agency wishes to terminate their contract. Note 44 of REC Model Contract 14 provides the following guidance in relation to gross misconduct:

"*Gross Misconduct:*
The disciplinary and dismissal procedure which accompanies the REC Model Contract 14 (Regulation 10 compliant contract of employment) specifies that the agency worker's refusal to obey a lawful instruction in connection with the employment, including the refusal of a suitable Assignment offered by the Company, will constitute gross misconduct. Depending on the situation it may be appropriate to terminate this Agreement by reason of the agency worker's gross misconduct with immediate effect. It is arguable that if employment is terminated by reason of the agency worker's gross misconduct it may absolve the Company from the need to pay the four-week aggregate Minimum Pay between Assignments (to the extent it has not already been paid previously). There are arguments for and against this approach:

1. *The initial draft guidance issued by BIS in April 2011 expressly set out that gross misconduct on the part of the agency worker would render them in breach of their contract and that they would therefore forego their entitlement to four weeks Minimum Pay before the contract could be terminated by the temporary work agency. This express confirmation did not make it into the final guidance. We are not sure why this is and whether its omission is because BIS now considers that this would be the incorrect approach. Ultimately the right to four weeks Minimum Pay before the contract can be terminated by the temporary work agency is a statutory right pursuant to Regulation 10 (1)(d) of the Agency Workers Regulations. In the absence of any express comment in the Guidance it will be necessary to argue that that provision does not apply for some reason.*

2. *From a pure policy perspective, it would be very unusual if there was intent to reward bad behaviour and misconduct with additional payments. Taking the example of the agency worker who resigns and gives notice – s/he will not be entitled to receive four-week Minimum Pay before the contract can end. This has been expressly excluded by the Guidance. It would therefore appear odd if the agency worker who is dismissed for gross misconduct is entitled to such payments before the contract can end.*

3. *Another potential argument is that in committing gross misconduct the agency worker has rendered him or herself "not available" for work and therefore the obligation to pay the agency worker under Regulation 10 (1)(d) does not arise.*

4. *Using the above arguments in order not to pay an agency worker who is dismissed for gross misconduct are not without risk. In any event a procedure will still need to be followed (which may take some time) to dismiss the agency worker from employment fairly. In addition you will need to evaluate in all the circumstances whether the refusal of any one particular Assignment is so unreasonable so as to constitute gross misconduct (if indeed that is the given reason for gross misconduct). REC cannot give definitive advice until there is case law on this point*."

At the time of writing, we are not aware of any cases which have looked at this point.

Of course, an agency worker can also terminate the Regulation 10 contract by giving the notice set out in the contract, in which case the pay between assignments would not be due.

7. The cost of employing agency workers

Agencies which are considering employing agency workers under AWR Regulation 10 contracts must consider all of the cost implications before they engage agency workers on such contracts. There are two key cost implications to consider:

- pay between assignments and the rate of that pay when the agency worker is not working (see section 7.1); and
- the increased costs associated with employees generally (see section 8).

7.1. The rate of pay when the agency worker is not working

7.1.1. The minimum rate of pay

AWR Regulation 11 sets out how to calculate the minimum rate of pay to be paid to the agency worker when s/he is not working. This must be at least 50% of the pay paid to the agency worker in the "relevant period", but this amount cannot be less than the applicable National Minimum Wage rate (see section 7.1.2).

The 50% pay rate should be applied against the week or month (depending on whether the agency worker is paid weekly or monthly) in which the temporary worker had his or her highest earnings in the 12 weeks prior to the date that the previous assignment ended. For the purposes of calculating the rate payable, only payments in respect of basic pay (i.e. annual salary, payments for actual time worked or by reference to output) are taken into account. Any bonus payments made during the relevant period are excluded.

Example 1

An employed agency worker's assignment ends on 31 December 2018 and despite the agency's best efforts, they cannot find a suitable assignment for him or her. The agency worker is paid weekly. The agency should count back 12 weeks from 31 December and identify the week in which the agency worker received the most pay. S/he would be entitled to receive 50% of this amount as the minimum rate of pay for each week during which s/he has no work, subject to a minimum of four calendar weeks during the contract before the contract can be terminated.

7.1.2. The National Minimum Wage floor

As stated at 7.1.1, the 50% pay rate is subject to a condition that it cannot be less than the applicable National Minimum Wage. This restriction will have a disproportionate effect in sectors that have hourly rates of pay close to the National Minimum Wage.

Below are three examples which demonstrate the impact of the 50% requirement on different rates of pay. The examples are based on an adult worker over the age of 22 who is entitled to the adult rate of National Minimum Wage (for those aged 25 and over this is currently £7.83, rising to £8.21 from 1 April 2019 – see the REC legal guide for the full range of National Minimum Wage rates) and assume that the hourly rates given when the agency worker has no work have been calculated in line with Regulation 11.

Example 2

The agency worker has an hourly rate of £20.00. 50% of this is £10.00 which, although above National Minimum Wage, will be the minimum rate of pay due to the agency worker when s/he is not working.

Example 3

The agency worker has an hourly rate of pay of £12.00. 50% of this is £6.00 but this is below the National Minimum Wage. In this case the minimum rate of pay when the agency worker is not working will be £7.83 (for those aged 25 and over) because, in order to comply with Regulation 11, the agency will not be able to pay less than National Minimum Wage. In this example, £7.83 equates to 65.25% of the hourly rate when the agency worker is working.

Example 4

An agency worker has an hourly rate of £7.83. 50% of this is £3.92. Again the minimum rate of pay payable when the agency worker is not working will be £7.83 because the agency will not be able to pay less than National Minimum Wage. In this example, £7.83 equates to 100% of the hourly rate when the agency worker is working.

7.2. Can the agency pay just one hour per week when paying between assignments?

AWR Regulation 10 provides that suitable work of at least one hour per week must be guaranteed under the AWR Regulation 10 contract. However, the minimum amount of pay that you would be liable to pay for pay between assignments (i.e. when the agency worker is available to work and you cannot provide the agreed amount of suitable work) does not relate to the hours of work guaranteed in the AWR Regulation 10 contract. AWR Regulation 11 specifically sets out how the pay between assignments is calculated. The amount of pay between assignments due will be 50% of the highest level of pay the agency worker enjoyed over the previous 12 weeks (subject to the National Minimum Wage floor).

8. Should an agency engage an agency worker on a contract of employment?

Some agencies and clients saw the possibility of agencies employing temps as a way of "getting round" the AWR (and to a large extent this has prompted the Government to agree to the abolition of the AWR Regulation 10 contract – see section 3.2). However, real consideration needs to be given to Regulation 10 to understand how it works and the financial and other obligations it imposes on agencies. In those sectors where agency worker pay rates are generally on a par with, or higher than the rates received by client's own employees (for example IT or locum doctors), the AWR have limited impact. In those sectors therefore, it may be completely unnecessary to engage agency workers on these contracts – losing the flexibility which comes with using temps engaged under a contract for services whilst the agency incurs greater liability for no real benefit.

In other sectors where agency workers are generally paid less than the client's own workforce (for example, in the care or industrial sectors), and where agency workers frequently meet the 12 week qualifying period required for the AWR to apply (see AWR Factsheet 3), tight margins and pressure from clients may have forced some agencies to consider the employed agency worker option. While some clients may no doubt see the benefit of using this type of contract, agencies need to ensure that there is sufficient provision in the margin to cover the following additional costs:

- the cost of paying the agency worker between assignments when there is no work available (see above);
- additional insurance, e. g. employers' liability insurance;
- statutory redundancy payments (where applicable);
- wages to be paid when training is being undertaken for health and safety reasons;
- the cost of additional HR mechanisms to deal with employee issues e. g. disciplinary matters and grievances; and
- holiday pay – even when they are not entitled to equal pay, employed agency workers will still be entitled to parity in terms of other working conditions. Therefore where clients provide more generous holiday entitlement than the statutory minimum, the agency will still need to provide this to the agency worker. However agency workers employed on an AWR Regulation 10 contract are not entitled to equal pay and so the REC view is that whilst they may be entitled to additional annual leave, such additional annual leave will be unpaid.

8.1. Mitigating the costs of Regulation 10 contracts

As the AWR Regulation 10 contract contains potentially costly obligations on the employing agency, the REC recommends that our members ensure that this is a commercially viable option for them before employing agency workers on this contract. For example, members should seek guarantees of a minimum volume of work from the client so that the agency can meet its obligations under AWR Regulation 10(1)(a) to provide the agency worker with the agreed number of hours of suitable work every week. Members should try to negotiate higher margins or that the client contributes to any pay between assignments – however, we recognise the difficult negotiating position many members find themselves in. Finally, an agency could also choose to employ some agency workers on AWR Regulation 10 contracts and supply these first to a client, and then supply agency workers on contracts for services where a higher than usual number of workers are required. This would minimise the liability to pay between assignments. Importantly, with the abolition of these contracts in 2020 agencies will need to assess the cost of either terminating existing contracts or continuing to employ agency workers.

9. TUPE and the "Swedish Derogation"

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply where there is a "relevant transfer" e.g. a client outsources services, changes the supplier of certain services or a business is sold. TUPE protects the employment rights of the employees of the client, outgoing supplier or selling company when the relevant transfer takes place.

TUPE allows employees to transfer their employment from the outgoing service provider to the incoming service provider and there are strict rules about the way in which the transfer needs to be carried out. In the case of such transfers, workers engaged under a contract for services do not enjoy the protection which is afforded to employees. In recruitment supply chains TUPE can apply where an agency which has employed agency workers is replaced by another agency or where umbrella companies are involved.[11]

[11] In *Twenty Fours Seven Recruitment and others v Afonso and others* [2018] the agency workers had been TUPE'd a number of times between the agencies and umbrella companies.

10. REC Model contracts and other support

The REC Legal Team have prepared Model Contracts 13 and 14 (respectively terms with the hirer and the agency worker). We have also prepared Model Contracts 15 and 16 where members want to employ agency workers, but on a zero hours basis (these will not meet the requirements of Regulation 10). We have also prepared a number of factsheets each dealing with different elements of AWR.

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:	Employing agency workers on a Swedish Derogation contract – when does equal treatment not apply?

For further support members can contact the Legal Helpline Monday to Thursday (8.30 to 5.30) and Friday (8.30 to 9am) on 020 7009 2199.

Edition History		
Edition 5	**January 2019**	• New section 3.2 regarding the abolition of the Swedish Derogation contract. • New section 3.3 on other amendments to the AWR. • Added a footnote in section 4 regarding recent case law on expected hours of work. • Updated section 6.1 regarding unfair dismissal • Amended the NMW rates in section 7. • Updated all hyperlinks.
Edition 4	**January 2015**	Reviewed- case added in section 4.2.1