Agency Workers Regulations - **Questions and Answers**

Q1. Who is an agency worker?

From 1 October 2011, protection exists where an individual is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer. Agency workers supplied via intermediaries (such as master and neutral vendors and so called "umbrella" companies) are also protected. However, the genuinely self-employed do not fall under the Regulations and are not protected, providing they are genuinely operating in business on their own account, in a business to business relationship with the hirer – whether that is as sole traders, through limited liability companies or self-employed partnerships.

Summary of protected agency workers

Supplied by temporary work agency	Yes
"Sham" self-employed or Managed Service Contracts	Yes
Supplied by intermediaries (eg umbrella companies)	Yes
Genuinely self-employed (contractors, consultants,freelancers)	No
Secondments	No
Genuine Managed Service Contracts	No

Q2. Do agency workers qualify for "equal treatment" with permanent employees?

No. Reference to "equal treatment" under the Regulations is a convenient, though somewhat misleading, shorthand for what the new legal rights mean. In summary, the Regulations do not entitle agency workers to full equality and do not impose an employment status between the agency workers and the hirer. In other words, they do not create a contract of employment with the agency worker.

A 12 week qualifying period applies before most (but not all) of the Regulations' benefits accrue and, thereafter, "equal treatment" is limited to defined basic terms and conditions of work only.

Summary of relevant pay and benefits

Basic salary Yes	Yes
Holiday (normal entitlement for employees)	Yes
Rest breaks/restrictions on night work	Yes
Company sick pay	No
Redundancy pay (statutory or enhanced)	No
Maternity/paternity/adoption pay	No
Pension	No
Long-service or loyalty bonus	No
Piece-work production target bonus	Yes (but not operated at UWE)
Luncheon vouchers	Yes (but not operated at UWE)
Access to on-site canteen or childcare facilities	Yes (but not if can justify)

Q3. It would be far simpler for us if we could pay agency workers for some of their holiday entitlement, in lieu of them taking leave. Can we do that?

The Regulations do not expressly permit the rolling up of holiday pay in the hourly rate. However, this would seem to be permitted in relation to the contractual element and is

referred to in the Guidance. Rolling up is unlikely to be possible for the statutory element as to do so would deny agency workers the opportunity of taking the leave from the outset. At the end of an assignment it appears that agency workers may be paid in lieu for accrued but untaken holiday in the same way that the Working Time Regulations allow for this for employees.

Q4. Does an agency worker have to accrue the 12 weeks qualifying service with the same agency?

No. The way in which the Regulations are drafted means that qualification for equal basic terms and conditions is dependent on 12 calendar weeks' service in the same role with the same hirer (as opposed to with the same agency).

Q5. What happens if the agency worker falls ill or fails to complete a full 12 weeks for that or some other reason?

The right to equal treatment in basic terms and conditions is only be triggered when the agency worker has accrued 12 continuous calendar weeks' service in the same role. But, in deciding whether service has been "continuous", the Regulations provide that a break between assignments of 6 weeks or less shall not break continuity for qualification purposes when the worker returns to the same role with the hirer.

Summary of absence on qualifying period – some examples

Illness or injury Paused	(for up to 28 weeks)
Public duties (eg jury service)	Paused
Planned workplace closure	Paused
Industrial action	Paused
Annual leave	Paused
Pregnancy related sickness	Continues to run

Q6. Who is liable if a qualifying agency worker believes he or she is receiving less favourable treatment than comparable employees doing the same job?

Initial responsibility for ensuring equal treatment for agency workers after 12 weeks lies with the agency. It is extremely important, therefore, that agencies pursue and then review the job information provided by the hirer. The Regulations specifically provide for agencies to obtain (or take reasonable steps to obtain) relevant information from the hirer about the basic working and employment conditions they apply and details of any comparable employee. Liability in relation to access to facilities and information about vacancies is the sole responsibility of the hirer.

Q7. Where an agency worker has already worked for the organisation for more than 12 weeks in the same role, do they immediately qualify for equal treatment from 1 October 2011?

The Regulations are in force from 1 October 2011. However, time spent by an agency worker on assignment before that date does not count towards the 12 week qualifying period; Counting 12 weeks forward from the date of implementation results in the week commencing 25 December 2011 as the earliest date for qualifying for equal treatment.

Q8. What does the “Swedish derogation” mean?

The Regulation’s equal treatment pay provisions do not apply if the agency employs the worker on a permanent contract. This is known as the “Swedish derogation”. There are some conditions, for example, the level of pay between assignments should be at least 50% of on-assignment pay and not below the national minimum wage. Realistically, this will only be viable for an agency where their margin is higher; to offset the risk of work not being available at certain times, or where work is plentiful.