



# Contracting and the Agency Workers Regulations (AWR)



# Contractor Calculator White Paper

- AWR comes into force on 1 October 2011
- Contractors will be affected, but in different ways
- Umbrella contractors are automatically in-scope
- Limited company contractors may be exempt
- AWR presents an opportunity for contractors

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Foreword by

# Rob Crossland of Parasol

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Contractors should reap the benefits of greater protection offered by the Agency Workers Regulations (AWR) when they come into force on 1 October 2011, without suffering unduly from increased costs and administration. There will be a 'bedding in' period, during which clients, recruiters and contracting solutions providers will jostle for position. But ultimately, it is the workers, the UK's contractors, who will benefit from greater compliance in the contracting sector. There will also be less risk of them suffering from financial losses as a result of service providers operating outside of the law or with unsustainable business models.

The bottom line is that, for UK contractors working through solutions providers offering overarching employment contracts, ie the classic umbrella company, there is no way round the new law. There is no 'get out of jail free' card, no exceptions and no excuses. Umbrella company contractors are within scope of AWR, and service providers need to get on with providing contractors with compliant trading solutions, not gambling that they might somehow 'get away with it'.

## Currently compliant umbrellas are only a few steps from AWR compliance

But umbrella solutions providers that are compliant with current legislation are already nine tenths of the way towards fulfilling the requirements of the AWR. So, for many solutions providers, post-1 October 2011 will be largely 'business as usual', and by no means the 'death of umbrellas' predicted by some. The threat to contractors arises from non-compliant service providers or those with unsustainable business models.

There will also be recruiters or clients choosing to remain ignorant of the requirements and implications of AWR. The risk is that these organisations simply put contractors in the 'too hard' basket and place assignments outside of the UK labour market, or even relocate. The knowledge economy, to which so many UK contractors contribute, is both global and highly mobile.

There is also no doubt that not all of the umbrella solutions providers currently operating in the UK will survive, and this is not always a reflection of their levels of compliance. Smaller umbrellas simply may not be able absorb some of the costs and risks associated with, for example, offering full employment models to contractors to comply with AWR. Others may fall from agencies' preferred supplier lists (PSLs), with recruiters that have been given the wrong facts about AWR choosing to deal only with limited company contractors because they have been told that this automatically removes such workers from AWR's scope.

*Umbrella solutions providers that are compliant with current legislation are already nine tenths of the way towards fulfilling the requirements of the AWR*

## Costs must pass through the supply chain transparently

The key to surviving the 'bedding in' process will be best practice and financial strength throughout the sector and supply chain. Margins are being squeezed at every stage of the supply chain and umbrella solutions providers must not undermine their business model by stretching margins too thinly. Umbrella companies must remain competitive but lower fees for contractors and payments to recruiters in the form of timesheet levies must be financed somehow. The risk is that business models may become unsustainable, leading to financial problems behind the scenes and ultimately businesses failing.

And although compliant umbrella solutions providers will be required to work with recruiters to assist their contractors with finding work, this should not be viewed by recruiters as an attempt to move into their space. Contractor recruiters fulfil a vital role in the supply of the UK's flexible workforce; contractors should continue to embrace their services which, in some sectors, place over 90% of contractors in assignments. Clients attempting to circumvent AWR by dealing direct with umbrellas won't escape the new laws. The umbrella company simply becomes the temporary work agency, instead of the recruiter, achieving nothing.

Clients won't all decide to dispense with agency services overnight, any more than we will see contractors fleeing into limited company trading solutions. Limited company solutions may be inappropriate for many contractors' personal circumstances, although clearly incorporation presents a viable route for some. Clients depend on recruiters for a whole range of compliance and brokerage services they could not easily or cost-effectively duplicate themselves.

## No planes will fall from the sky on 1 October 2011

The deadline of 1 October 2011 should be perhaps viewed as a 'Y2K' moment when, despite the hype, no planes fell from the sky. There is a lack of knowledge about AWR within the contracting sector, but that is common with most new legislation – the incentive to learn is greater when the legislation is actually in force.

Without doubt some labour organisations are lining up the first claims and tribunals taking advantage of the new law. Whilst no organisation would wish to be the subject of a claim, this is an important part of the implementation of any new law. We will also learn, when the first cases are heard, how the source legislation differs from the guidance issued by the government and how this will impact on future compliance.

All stakeholders, from contractors to service providers, recruiters and clients, should stay calm and carry on, not panic and, above all, communicate. Contractors should look to their service providers and agencies to guide them on what action to take now and once AWR comes into force. Largely, this will be nothing. For a few contractors, it may mean using a different trading option. For all contractors, it shouldn't mean being panicked or pushed into an inappropriate trading solution, simply because their agency or client does not understand the new law.

Changes in the law can often present much more in the way of opportunities than they do threats, but only if organisations are able to recognise these opportunities. And AWR will be with us on 1 October 2011 – there's no avoiding it. So it is incumbent on umbrella solutions providers, who after all only exist to allow contractors to trade, to ensure it is contractors who ultimately benefit in the new era of AWR.

*Rob Crossland, Chief Executive*

Parasol Group, September 2011

# 1. The history of the Agency Workers Regulations

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Contractors worrying about the effects of the Agency Workers Regulations<sup>1</sup> (AWR) may be surprised to learn that the legislation was originally intended to promote “more flexible forms of work”. The theory was that AWR would facilitate Europe’s transition towards a knowledge-based economy; the reality may prove very different.

In fact, when the Agency Workers Regulations come into force on 1 October 2011, many fear that they have the potential to have a profound impact on the UK’s flexible labour market generally, and on contractors and contracting specifically. Although canny contractors should be able to turn this period of market turmoil to their advantage.

But why did the UK require these new employment laws and how have they evolved into the legislation coming into force in October? We examine the history of the Agency Workers Regulations, and the Agency Workers Directive<sup>2</sup> (AWD) on which the regulations are based, to help understand the impact the new rules will have on contractors and contracting.

## Why Europe needed an Agency Workers Directive

Proposals to tighten up Europe-wide legislation covering temporary workers had been debated for some years before the original formal proposal<sup>3</sup> for the Agency Workers Directive was published by the Commission of the European Communities in March 2002.

Up until that point, treatment of temporary workers across the European Union’s member states varied hugely. In some member states, temporary labour markets were dominated by vulnerable low paid and low skilled agency workers, who were frequently abused by hirers and agencies.

At the other end of the scale, markets like the UK include substantial numbers of highly paid and highly skilled knowledge workers, such as contractors and freelancers, who would fiercely deny any suggestion of vulnerability.

The Agency Workers Directive was created to provide European Union member states with a common approach to regulating their temporary labour markets. In some countries it would also protect temporary workers from abuses by hirers and agencies.

## What the Agency Workers Directive set out to achieve

As already mentioned, the original intention was for the AWD to promote Europe’s knowledge economy and flexible working. This has been considerably watered down. Now, the main thrust of the AWD is to ensure that temporary workers receive equal treatment from their hirers, comparable to if they’d been recruited as a permanent employee for the role. Specifically, article 5 of the directive says:

The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2010/93/contents/made>

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF>

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0149:FIN:EN:PDF>

The idea was that unscrupulous hirers, aided by agencies, couldn't ship in lots of low paid temps to take the place of expensive employees, as is common practice in some member states. However, and crucially, the directive did not clarify or change the employment status of agency workers.

What took the next five years to resolve was the qualification period, ie the length of time a temp would work on a given assignment before being awarded equal pay and conditions.

And, although the then Labour government did a deal, the Warwick Agreement<sup>4</sup>, with unions promising to implement the directive, the UK then successfully blocked progress throughout that period. The government argued that the proposed directive was more likely to destroy jobs by making temps a much less attractive option for hirers.

## Deadlock breaks in December 2007

A series of events led to the UK losing its ability to block progress on the directive in December 2007. A combination of concessions granted over the working time opt-out provisions and domestic pressure from the UK finally resulted in agreement over the qualification period.

And then what sealed the deal was a back-room agreement between the Trades Union Congress (TUC) and the Confederation of British Industry (CBI), two of the UK's social partners working towards agreement on the directive. They finally agreed on a qualifying period of 12 weeks as the time after which temporary workers gained the same rights as their full-time counterparts.

In June 2008 the European Council agreed on a common position over the directive, and in October 2008 the European Parliament approved the directive without amendment. At long last, and after six years of wrangling, the Agency Workers Directive was passed.

## How the 'directive' became 'regulations'

Once the final form of the Agency Workers Directive was agreed, with the qualifying period set at 12 weeks and further amendments, such as the Swedish Derogation, negotiated by other member states, progress towards the Agency Workers Regulations was swift. Some might say too swift, and that the schedule did not allow time for proper scrutiny.

The first stage of consultation on the draft directive, plus the CBI/TUC proposals and when the regulations should come into effect all took place very quickly, between May and June 2009.

Then, during another short period in October to December 2009, the Department for Business, Innovation and Skills (then the Department for Business, Enterprise and Regulatory Reform), consulted over the draft regulations.

## The AWR becomes law, but implementation is delayed

The draft Agency Workers Regulations, as the directive had now become, in turn were laid before Parliament on 21 January 2010, allowing just a few short weeks for consultation and scrutiny. However, despite the indecent haste in which the process had been rushed through up until then, it suddenly slowed down, as the then Business Secretary Lord Mandelson delayed implementation until 1 October 2011. This was to allow UK businesses to prepare for the new legislation.

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<sup>4</sup> [http://en.wikipedia.org/wiki/Warwick\\_Agreement](http://en.wikipedia.org/wiki/Warwick_Agreement)

There is still considerable concern over how the Agency Workers Regulations 2010 will impact on the UK's flexible workforce. The guidance published by BIS in May 2011 still leaves many questions unanswered, particularly over what sort of workers are in scope and what tests will be applied to determine whether a limited company contractor is considered to be covered by the AWR.

Contractors will face a period of uncertainty immediately following 1 October 2011, when some of the equal rights under the AWR must be granted to agency workers. Another crucial time will be the weeks following 31 December 2011, which represents the first 12 week period after the legislation comes into force.

From that time, the first cases will be brought to the employment tribunals, and hirers and contractors alike will start to understand the reality of the risks they face as a result of the AWR.

*There is still considerable concern over how the Agency Workers Regulations 2010 will impact on the UK's flexible workforce*

## 2. Using the law to gain competitive advantage & win contracts

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Contractors who can demonstrate a thorough knowledge of the Agency Workers Regulations (AWR) and argue convincingly that it does not apply to them will gain competitive advantage when dealing with clients and agencies who may view them as a threat.

When the regulations come into force on 1 October 2011, it will be important for all contractors, whatever trading option they are using, to understand whether AWR will affect them and, if it does, what actions they need to take.

Limited company contractors are likely to be out of the scope of AWR by virtue of being a “business undertaking”. And umbrella contractors will typically choose providers offering either a full employment umbrella solution, with elements of what’s also known as the Swedish Derogation, or matched permanent pay.

### Understanding the legislation will help win over clients and agencies

For some time after AWR comes into force, it is likely that contractors will encounter clients and agencies that have little or no understanding of AWR. That lack of understanding may lead them automatically to assume that contractors are agency workers and are therefore a threat to their business.

But contractors having a good understanding of AWR will be in a much stronger position to win over such clients and agencies. In fact, at least until the regulations are embedded into the UK’s business psyche, they may well become a source of competitive advantage. What that could mean is that the best contracts will go to contractors who can argue most convincingly that AWR does not apply to them.

*For some time after AWR comes into force, it is likely that contractors will encounter clients and agencies that have little or no understanding of AWR*

Understanding where to find the source legislation and what it actually says are important steps towards contractors gaining the confidence to convincingly argue their case.

### What is legislation and what is guidance?

The best place to find out what the law actually says is to go to the source legislation and associated documents. There are three documents, and a further class of documentation, that contractors should be aware of:

- **The Agency Workers Directive (AWD):** the original directive issued by the European Commission and ratified by the European Parliament on 19 November 2008. It is this directive on which all member states’ individual legislation must be based

- **The Agency Workers Regulations (AWR):** the UK legislation, based on the directive but 'gold plated' by the government, laid before Parliament on 21 January 2010 and due to come into force on 1 October 2011
- **Guidance from the Department for Business Innovation and Skills (BIS)<sup>5</sup>:** BIS is the government department sponsoring AWR. At the time of writing, its 'final' guidance for agencies and hirers was published in May 2011. BIS is expected also to publish guidance for workers before the legislation comes into force in October 2011.
- **Unofficial guidance and guides (like this one):** The internet abounds with unofficial guides from a number of sources. Many of these guides are informative and useful; others include numerous inaccuracies and in some case are downright wrong on some crucial aspects of AWR. Approach with caution.

For the internet links to the AWD and AWR, please see the footnotes in chapter 1.

## What the law actually says

The Agency Works Regulations legislation is 36 pages long. The 6 pages of the original directive became 18 pages of core legislation in 5 parts, and a further 18 pages of accompanying schedules in two parts. As legislation goes, it's actually relatively short and accessible. The key elements are:

**PART 1** explains the definitions of agency workers and temporary work agencies. Clause (2)(a) contains the crucial phrase of most interest to limited company contractors, which confirms that an individual is not an agency worker if they are carrying out a "business undertaking"

**PART 2** lays out the rights that agency workers will receive on the first day of each assignment and after 12 weeks. It also explains how the 'qualifying period' of 12 weeks works, how to calculate pay, and many other practical details. Part 2 also contains Regulation 10, also known as the Swedish Derogation, which may prove to be a solution for some umbrella company contractors who wish to remain out of the scope of AWR.

**PART 3** largely covers what action agency workers can take to ensure they are granted the new rights and what to do if those rights are infringed. Part 3 also includes anti-avoidance measures. There is less material of interest here for genuine contractors.

**PART 4** deals with special cases and exemptions, while PART 5 is a technical note referring to the main schedule 2. SCHEDULE 1 is a technical note, but SCHEDULE 2 details how the AWR will integrate with existing legislation. This schedule is as long as the core legislation. These sections contain little that is of interest to contractors.

However, Parts 1 and 2 of AWR are of crucial importance, because they explain who is in the AWR's scope and who is outside it. But, in some respects, their real value is that they drive the guidance from BIS, which is what most agencies and clients will turn to when considering whether a contractor is an 'AWR risk'.

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<sup>5</sup> <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance.pdf>

# 3. Who will be in AWR's scope and what rights they will receive

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Contractors will be affected by the Agency Workers Regulations (AWR), either because they will need to demonstrate to agencies and clients that they are outside of its scope, or because they are in its scope.

Those who are in its scope can choose to claim a range of new employment rights on the day the regulations come into effect on 1 October 2011. They will also be able to claim additional rights after working on an assignment for 12 weeks.

Contrary to common belief, limited company contractors will not be automatically excluded from AWR's scope – they may have to demonstrate to clients and agencies that they are genuine businesses and not agency workers. Limited company contractors have not been explicitly excluded to prevent unscrupulous agencies forcing lower skilled and potentially vulnerable workers to incorporate as an avoidance tactic.

Umbrella company contractors are considered to be in AWR's scope, unless their solutions provider offers one of two solutions: either a full employment umbrella solution, with elements of what's also known as the Swedish Derogation, or a matched permanent pay solution.

## Key parties affected by the regulations

According to AWR, there are three parties affected:

- The agency worker, for example a temp or, under certain circumstances, a contractor
- The temporary work agency, for example a recruitment or staffing agency
- The hirer, typically a contractor's end-user client.

The definition of a temporary work agency provided in the regulations, and in the guidance for hirers and agencies supplied by the Department for Business Innovation and Skills (BIS), is very wide. The regulations state that a temporary work agency is "a person in business...involved in the supply of temporary agency workers".

This means that, for example, a contractor's limited company could be viewed as a temporary work agency, particularly if it subcontracts work to other contractors.

The 'hirer', or in contracting terms the 'client', is defined as:

... a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person.

This definition applies to all contractor clients, except in the unusual cases where the contractor is genuinely not supervised or directed by the client.

## How to define an ‘agency worker’

In clause 3(1) of the regulations, an agency worker is defined as an individual who:

- (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and*
- (b) has a contract with the temporary work agency which is—*
  - i. a contract of employment with the agency, or*
  - ii. any other contract to perform work and services personally for the agency.*

The key term in the definition is **‘supervision and direction’**, because that basically means virtually any contractor irrespective of their trading vehicle could choose to be in AWR’s scope if they wanted to be. And that’s because very few contractors are not in some form or other under the ‘supervision and direction’ of their client.

For a contractor to be supervised and directed by a client, the client would merely need to ask the contractor to work on a specific project and periodically check how the contractor is progressing.

Note that ‘supervision and direction’ are not the same as ‘control’ in the context of IR35. As AWR is understood at present, a contractor could be quite happily directed and supervised by their client, and claim rights under AWR, but not be controlled by the client and be outside of IR35.

The guidance for clients and agencies specifically identifies contractors using umbrella solutions providers as being within the scope of the regulations. It also confirms that contractors trading via limited companies could still be covered by AWR.

*For a contractor to be supervised and directed by a client, the client would merely need to ask the contractor to work on a specific project and periodically check how the contractor is progressing*

## When is a contractor not in the scope of AWR?

The regulations state that an individual is not an agency worker if:

- a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or
- b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

Limited company contractors can demonstrate that they are outside of AWR if they are in a profession or business undertaking. Current thinking suggests that a contractor’s personal service company would qualify as a business undertaking, although there are currently no formal tests that can categorically define whether a contractor’s limited company is a ‘business undertaking’.

The tests of employment used to define whether a contractor is a disguised employee for the purposes of IR35 are not relevant to a contractor trying to prove their status under AWR. However, it is likely that if a contractor shows all the signs of being a disguised employee and not a genuine business, that same evidence would apply when considering AWR status.

## Rights granted under AWR from day one

From 1 October 2011, contractors who are in the scope of AWR will qualify for a range of 'day one' rights. A further range of equal rights are granted after 12 weeks, which in practice will mean it will be 12 weeks from 1 October 2011 before anyone qualifies for '12 week rights'.

From October 2011, contractors in the scope of AWR will qualify for the following day one rights each time they start a new assignment with a client:

- Access to shared facilities at their client's site – eg canteens, crèches and transport services, such as a minibus from the nearest station or car park
- Access to information about client vacancies.

A client that has many umbrella company contractors, or limited company contractors who decide to claim their rights, could suddenly find demand soaring for shared services from 1 October 2011.

## Rights granted under AWR after 12 weeks

Once a contractor has been on assignment for 12 weeks, they can claim the same terms and conditions as a full time permanent employee performing the same role. These include:

- Pay
- Bonuses that are dependent solely on the contractor's performance
- Holidays and holiday pay
- Working hours and rest breaks
- Maternity benefits, such as paid time off for ante-natal appointments.

However, equal pay rights exclude company-wide bonuses, expenses, pensions and life assurance, share options, redundancy pay, sick pay and maternity/paternity pay if the client's scheme is more generous than the statutory payments.

Technically, most contractors will be able to choose to claim these additional rights under AWR and remain outside IR35, because they are 'supervised and directed', but not controlled, by their clients.

Limited company contractors with a good understanding of AWR should be able to demonstrate that their limited company is a business undertaking, and that they won't be responsible for increasing their client's costs by trying to claim employment rights under AWR.

But until the regulations have been in force for a while and tested in tribunals and the courts, it won't be possible to say with certainty exactly what a contractor's individual status might be.

## 4. Formal guidance from BIS

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Contractors can use the guidance for agencies and hirers published in May 2011 by the Department for Business Innovation and Skills (BIS – see footnote 5) to help determine whether they are in the scope of the Agency Workers Regulations (AWR).

The guidance is valuable for contractors because it offers examples of individuals who are in AWR's scope and includes detail of BIS's interpretation of who is out of its scope.

However, until the regulations are in force and tested in employment tribunals and the courts, there is still room for further interpretation, and for some contractors this means ongoing uncertainty.

### Guidance from BIS on who is in AWR's scope

Whilst the legislation provides a definition of an agency worker, BIS goes one step further and offers examples of the kind of individuals it sees as falling within the scope of AWR. BIS says that, for an individual, such as a contractor, to be an agency worker:

- There must be a **contract** between the contractor and the temporary work agency (BIS uses the abbreviation 'TWA' to describe contractor agencies)
- The **agency** supplies the contractor on a temporary basis to the client
- The contractor is under the 'supervision and direction' of the **client**. Note that this is not the same as 'control' in an IR35 context
- The contractor **is not in business on their own account**.

The guidance goes on to warn, on page 9 in the 'Out of scope' section, that:

Simply putting earnings through a limited company would not in itself put individuals beyond the possible scope of the regulations.

So it would appear that a limited company contractor could still be considered to be in AWR's scope if they fulfil the other 'in-scope' criteria. The key to being in scope is the tripartite relationship between agency, client and contractor – without it the regulations can't apply.

*According to BIS, genuine contractors should have few fears that AWR will apply to them*

Umbrella company contractors are automatically considered to be in the scope of AWR, as umbrella solutions providers are classed as 'temporary work agencies' (TWAs); no exceptions are given.

## BIS definition of who is out of AWR's scope

Genuine contractors supplying their services via a limited company, partnership or as a sole trader, and not through an umbrella company, are out of scope, as the definition from BIS suggests:

The definition of an agency worker excludes those who are in business on their own account where the status of the hirer is that of a client or customer of a "profession or business undertaking" (i.e. a genuine business to business relationship).

## The Guidance warns that if there is a dispute over status:

The courts have devised a number of tests which examine the individual's circumstances and consider all aspects of the relationship, including what a contract might say or what it does not say, the expectations of the parties and their conduct, to establish the reality of the relationship.

BIS provides an example on page 11 of an IT contractor working on a typical 12 month contract which suggests that, when finalising the Guidance, BIS understood the mainstream contracting model and that genuine contractors are not intended to be in AWR's scope. The case study says:

Given the absence of personal service and mutuality of obligation, the [hirer/contractor client] company is a client or customer of the individual, therefore the individual is out of scope. This must be a true reflection of the reality of the relationships between the parties involved and not simply a reflection of the contractual terms.

According to BIS, genuine contractors should have few fears that AWR will apply to them. However, there is no definitive test for what constitutes 'being in a business undertaking' and until that is clarified by testing the legislation in tribunals and the courts, there remains some uncertainty for contractors.

Despite its comprehensive and useful nature, the guidance from BIS is just that – guidance. When ruling during tribunal or in higher courts, a judge will always seek out and apply the source legislation. And until the legislation has been tested in the courts, some of its provisions, such as the definition of a 'business undertaking', will remain uncertain.

# 5. Trading options for contractors when AWR comes into force

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Contractors concerned that the Agency Workers Regulations (AWR) could impact negatively on their livelihoods have a number of trading options to choose from. The trading options available can establish contractors' credentials as a genuine business undertaking or offer an umbrella solution that works alongside the AWR to minimise or eliminate additional costs for clients.

It is these additional costs of implementing AWR that many contractors fear will result in clients simply choosing not to hire UK-based contractors at all, or to send these assignments abroad to lower cost and less well regulated jurisdictions.

Contractors are far from being the vulnerable temporary workers that the AWR is designed to protect. Fortunately there are trading solutions that will not result in increased cost and administration burdens for clients and offer contractors the choice as to whether or not they want to claim the employment rights granted by AWR.

## Umbrella company contractor trading solutions

The Guidance from the Department for Business, Innovation and Skills (BIS) is unequivocal about AWR's treatment of umbrella company contractors: they are in the scope of the regulations. That means clients using umbrella company contractors will be required to offer day one rights and equal pay after 12 weeks, as the regulations demand.

However, an umbrella solutions provider operating compliantly and already putting into place best practice will already be most of the way towards offering a solution that complies with AWR. The two main options for umbrella companies are the:

- **Full employment model**, which provides contractors with pay between assignments. In theory, compliant umbrella companies should already be providing pay at National Minimum Wage (NMW) levels between assignments, so full employment is a relatively small step forward for such service providers. This model uses the 'Swedish Derogation' to remove contractors from the scope of the equal pay requirements of AWR, although in practice it will offer contractors a better deal of employment rights than is strictly necessary under the Swedish Derogation. The client must also make day one rights available to contractors using this model.
- **'Match permanent pay' model**, which, as its name suggests, requires that the contractor enjoys the full benefits of AWR, gaining day one rights and matched pay after 12 weeks. This model is significantly more complex to administer than the full employment model, and will cost clients more after 12 weeks, but it does allow contractors to choose to accept the employment rights granted by AWR.

Not all umbrella companies will be in a position to offer both trading models, particularly as both require a high level of compliance. Contractors should ask their umbrella solution provider what plans it has to ensure that they are trading compliantly after 1 October 2011.

## Business undertaking trading solutions

Contractors genuinely in business who want to continue to trade without any AWR compliance issues can effectively continue as before. There are three main trading vehicles for contractors in a profession or business undertaking:

- Limited company
- Partnership
- Sole trader.

Although these are all legitimate trading vehicles for contractors running a business, in practice the overwhelming majority of agencies and clients will insist that contractors use a limited company. By using contractors trading via limited companies, agencies and clients are able to minimise the risk of workers claiming employment rights. That works to both sides' advantages, because genuine contractors don't want employment rights.

The BIS guidance warns that a contractor trading via a limited company can still be in the scope of AWR. But it also makes it clear that contractors genuinely in business on their own account, "in a profession or business undertaking", and where the client is a customer and not an employer, were never intended to be the targets of AWR.

Contractors choosing to trade via a limited company are recommended to use a specialist contractor accountant. This is because contractor limited companies, although technically no different from any other business that trades via a limited company, have a range of unique features and needs, and are the focus of specific legislation that contractor accountants deal with every day.

*Contractors genuinely in business on their own account, "in a profession or business undertaking", and where the client is a customer and not an employer, were never intended to be the targets of AWR*

## Offshore trading solutions

Since the introduction of the Employment Income Through Third Parties legislation in December 2010, also known as the 'disguised remuneration' laws, many offshore tax solutions such as Employee Benefit Trusts (EBTs) have closed. Others have developed to offer schemes based on currency arbitrage or other financial mechanisms, although some of these have already been targeted by HMRC in its 'Spotlight 12'<sup>6</sup>.

The status of contractors using these schemes will depend on the individual scheme itself and the type of employment model it offers. Some solutions will undoubtedly fall into the exempt categories listed in the Guidance from BIS, but contractors from other solutions may be in AWR's scope.

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<sup>6</sup>[http://www.contractorcalculator.co.uk/hmrc\\_signals\\_direct\\_attack\\_contractors\\_393110\\_news.aspx](http://www.contractorcalculator.co.uk/hmrc_signals_direct_attack_contractors_393110_news.aspx)

## Contractors can continue to trade and be out of scope

Until the legislation comes into force on 1 October 2011, and is subsequently tested in employment tribunals and the courts, there will be an element of uncertainty for all contractors, irrespective of how they trade.

However, there are several trading options available that, based on the existing body of knowledge, will allow contractors to operate outside the scope of AWR. As a result, the risk that clients will stop using contractors because of additional costs and compliance is reduced.

Contractors genuinely running a business undertaking should be able to continue to do so after 1 October 2010. And umbrella company contractors will be able to choose between solution providers to find an umbrella trading solution that suits their AWR needs.

# 6. About the Authors – ContractorCalculator and Parasol

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## ContractorCalculator



ContractorCalculator is the UK's leading website for contractors and freelancers.

It has been online and independent since 1999, when it launched ir35calc.co.uk to help contractors count the cost of the then newly released IR35 legislation.

Still owned by founder and former IT contractor Dave Chaplin, the site has grown dramatically since then to become the expert guide to contracting. Dave is still actively involved in its management, supported by a dedicated team of contractors and freelancers.

ContractorCalculator's ABC-audited monthly audience of over 130,000 regular readers is made up of contractors, freelancers, interims and consultants from the IT, telecoms, engineering, oil, gas and energy, business, marketing and medical sectors. They keep coming back as the site offers:

- A comprehensive range of essential online financial, salary and tax calculators
- A high quality daily news service from a professional editorial team
- Expert commentary and analysis from industry and sector leaders
- More than 1,000 online articles and guides suitable for beginners and veterans
- Access to leading contractor services.

As a result of this fantastic resource for those new to contracting and experienced old-hands, ContractorCalculator has been dubbed 'The Expert Guide to Contracting'. It is also the publisher of the definitive guide to UK contracting – **The Contractors' Handbook: the expert guide for UK contractors and freelancers.**

## Parasol



Parasol is the UK's favourite outsourced employment services business and PAYE umbrella company providing payroll services for contractors and freelancers, either directly or through agencies. Created in 2000 by contractors for contractors, Parasol takes care of timesheets, invoicing and tax whilst providing a host of added benefits to ensure contractors' careers are HMRC compliant, legal and hassle-free, with no risk of unexpected tax bills.

Parasol works with over 10,000 contractors and temps in the UK every year and partners with over 2,500 of the recruitment and staffing businesses that place them.

Parasol is a founding member of the Freelancer & Contractor Services Association (FCSA), an independent industry association established to set the standard for companies providing services to the professional freelance workforce. As a founding member, Parasol has a track record and pedigree for compliance and best practice and has been amongst the industry leaders in preparing recruiters for the AWR.

The Parasol Family of companies also includes ClearSky Accounting, the leading accountancy firm for contractors and small business start ups. In 2010, Parasol climbed 21 places to rank 44th in the latest Sunday Times HSBC Top Track 250 league table.

# Contact us

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