

What does the Agency Workers Directive mean for contractors?

When it was [first announced](#) that the Trades Unions Congress ([TUC](#)), the Confederation of British Industry ([CBI](#)) and the UK government had done a 'beer and sandwiches' deal to introduce the [Agency Workers Directive](#) (AWD) by the back door in May 2008, many in contracting feared their livelihoods and way of life would become extinct as a result.

The [second stage consultation](#), which includes the [draft legislation](#), published by the Department of Business, Innovation and Skills in October 2009 revealed the good news that not only has the legislation been delayed until October 2011, but also that limited company contractors are specifically excluded.

However, the consultation period of less than two months was ludicrously short for legislation as complex and far reaching as the AWD. In addition, the proposed legislation specifically includes [umbrella company contractors](#) and the status of contractors working on contracts that are inside of [IR35](#) is unclear.

The impact of the AWD on agency workers

The reasoning behind the directive, which was originally created by the European Community (EC) in Brussels, is to protect vulnerable low-paid agency workers from being disadvantaged by organisations taking advantage of their vulnerable status. Naturally, most genuine contractors would resent the implication that they are in any way 'vulnerable' workers, but this terminology reflects the differing philosophies of labour market relations and flexibility in the UK versus most of the rest of Europe.

Once implemented, the directive will require that agency workers qualify for the same pay, terms and conditions, including having rights to maternity/paternity benefits, as a comparable worker who is a permanent employee. This will happen either as soon as the agency worker starts working, or after what's known as a 'derogation period', in the directive's wording. The derogation period will be decided by each EU member state when it comes to implement the directive into national law.

The back-room deal struck by the government, TUC and CBI in May 2008 included an agreement over the UK's derogation period, which was set at 12 weeks. So, according to this agreement, all agency workers in the UK will qualify for the same terms and conditions as comparable permanent employees after working for the same client, via an agency, after 12 weeks. The Recruitment and Employment Confederation ([REC](#)) estimates that between 50 and 60% of temporary agency assignments last fewer than 12 weeks, so workers on 40 to 50% of assignments are likely to be entitled to 'employee' rights.

How will the AWD affect contractors?

Specifically, the draft regulations say 'people finding temporary work through a "temporary work agency" [employment business]' will be covered, and the definition of an agency worker will be 'based on that used for "workers" in the Working Time Regulations 1998'.

According to the regulations, 'this will exclude workers who are genuinely one of the following: the self-employed; those working through their own limited liability company; or those employed on 'Managed Service Contracts'. In other words, limited company contractors will not be affected by the AWD.

Conversely, umbrella company contractors are firmly in the sights of [BIS](#), with the regulations leaving no room for doubt: 'the scope of the definition does, however, include agency workers contracted to an umbrella company'.

The status of contractors working on contracts inside of IR35 is, however, unclear. Those contractors 'who operate a [personal service company](#) but are not genuinely self-employed' are considered to be included. This could be interpreted to mean that for some contracts, the contractor is covered by the AWD but for others they are excluded, potentially leading to a rerun of the IR35 debacle if this is not made clearer.

Timing and implementation

Despite reports from the October 2009 Trades Union Conference that Prime Minister Gordon Brown claimed the AWD would become law "in the coming months", this does not seem to be the case. BIS appears to have taken on-board the feedback from the recruitment and contracting sectors that it would be wise to delay implementation, and has set a date for October 2011 for the legislation to come into force.

This delay is a crucial opportunity, as it allows a range of counter-measures to be taken. The contractor services sector, for example, has time to launch new contractor trading options to replace umbrella companies and ensure they remain outside the scope of the regulations.

In addition, in the event that the general election (which must take place before early June 2010) results in a change of government,

the new administration would have time to repeal or amend elements of the regulations. The hope would be that contractors would be given an opt-out, recognising them as leaders of the UK's flexible knowledge sector workforce who have an important part to play in ensuring the competitiveness of UK PLC.

The next chapter in the AWD saga, the response to the second-stage consultation and the publication of the final Agency Workers Regulations that will enter the statute book to become law, is due in the first quarter of 2010. This is when the fate of contractors, at least until after the general election, is known.

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