

Employment & Employee Benefit

The EU Directive on Temporary Agency Work (Directive 2008/104/EC)

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The Temporary Agency Workers Directive introduced protection for temporary agency workers and applies the principle of equal treatment between temporary agency workers and directly recruited employees in relation to basic employment terms and conditions. The Directive was due to be transposed into Irish law by 5 December 2011 but to date the transposing legislation has not been enacted, but the Government published the Protection of Employees (Temporary Agency Work) Bill 2011 ("the Bill") on 16 December 2011¹.

When a deadline for transposing an EU Directive passes the Directive may have "direct effect" which means that if the Directive is sufficiently clear, precise and unconditional it may be enforced against the State or an emanation of the State, in this instance providing protection to public sector workers. The Department of Jobs, Enterprise and Innovation published a notice on 5 December 2011 indicating that all hirers and employment agencies should make appropriate arrangements to ensure that equal treatment is put in place from 5 December 2011 for all temporary agency workers. Both the notice and the Bill indicate that the transposing legislation will have retrospective effect from 5 December 2011.

The Directive applies to temporary agency workers who are employed by an employment agency under a contract of employment and are assigned to work temporarily for and under the direction and supervision of the hirer of the temporary agency worker ("the Hirer").

The Bill provides for equality in respect of the following basic working and employment conditions:

- Duration of working time, rest breaks, rest periods, night work, annual leave and public holidays; and
- Pay.

Pay is defined in the Bill as basic pay and any pay in excess of basic pay in respect of shift work, piece work, overtime, unsocial hours worked and hours worked on a Sunday.

Temporary workers are entitled to equal access to facilities and amenities such as canteen or other similar facilities, child care facilities and access to transport services, unless there are objective grounds that justify less favourable treatment. This is the only area in which an employer can allow unequal treatment if it is objectively justified.

Equal treatment applies from the first day of the temporary agency worker's assignment. This means that there is no qualifying service period in Ireland for the legislation to be applicable as in other

¹ IBEC is seeking an amendment to the retrospective effect of the Bill.

jurisdictions like the UK (where agency workers must be employed by the Hirer for 12 weeks prior to being entitled to equal treatment).

In addition, agency workers are to be included in the calculation of the number of employees for the purposes of various laws concerning the consultation of workers, including in relation to collective redundancy.

Redress

As employer, the employment agency has primary responsibility for ensuring that equal treatment is provided to agency workers. However, this is dependent on the employment agency being provided with sufficient up-to-date information by the Hirer. The Bill provides that there is an onus on the Hirer to provide the employment agency with all such information which the agency reasonably requires in order to comply with the equal treatment requirements of the Bill. The Bill provides that the Hirer will indemnify the employment agency in respect of any loss incurred by the agency that is attributable to the Hirer's failure to comply with its obligations. The Minister for Jobs, Enterprise and Innovation may make Regulations regarding the information to be provided, once the Bill is enacted.

Temporary agency workers can seek redress against their employer by presenting a complaint to a Rights Commissioner and either party may appeal the decision to the Labour Court. The Rights Commissioner may order that a specific course of action is followed and/or require the employer to pay compensation of up to two years remuneration.

In most cases, including the key area of equal treatment on pay and conditions, a claim would be made against the employment agency. The only exceptions to those are on access to information about permanent vacancies and access to collective facilities, where the Hirer is taken to the employer.

Practical Steps

Hirers should:

- Undertake a review of the terms and conditions of engagement of all temporary agency workers engaged by them;
- Consider each terms and condition of employment of their comparable employees, identify whether it needs to be matched for temporary agency workers and quantify the potential cost;
- Furnish such information as the employment agency reasonably requires. Hirers should address what information is given to agencies and who in the organisation will be responsible for giving this information;
- Review their contractual documentation with the employment agency and obtain legal advice in drafting appropriate indemnities and warranties for insertion into new or revised contracts.

Employment agencies should:

- Review their contractual documentation with Hirers and obtain legal advice in drafting appropriate indemnities and warranties for insertion into new or revised contracts.
- Include in contractual documentation with Hirers an obligation on Hirers to provide information about pay and basic working conditions of the Hirer's comparable staff to the agency.

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