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## The Publication of the Agency Work Bill – Clarity or Confusion?

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### INTRODUCTION

The Minister has now published the much anticipated Bill to give effect to the Temporary Agency Workers Directive.

### THE PROTECTION OF EMPLOYEES (TEMPORARY AGENCY WORK) BILL, 2011

The Protection of Employees (Temporary Agency Work) Bill, 2011, (“the Bill”), is expected to be enacted into law in early 2012 and the provisions of the Bill dealing with an agency worker’s entitlement to equal pay will be effective from the 5<sup>th</sup> December 2011.

The retrospective nature of the Bill has caused surprise, and no level of confusion. This was an unexpected development. From a legal perspective, retrospective legislation raises constitutional issues and this will have to be looked at in more detail now that the Bill has been published.

The Minister has also published a frequently asked questions document (“FAQ’s”) on this issue on the Department website, [www.djei.ie](http://www.djei.ie). All HR practitioners, agencies and client companies alike should familiarise themselves with the Bill and the FAQ’s.

The aim of this article is to provide guidance on the main provisions of the Bill and what it means for your business – whether you are supplying or hiring the agency workers.

### Who is an “Agency Worker” under the Bill?

“Agency workers” are defined in the Bill as individuals employed by an employment agency (“the Agency”) under a contract of employment by virtue of which the individual may be assigned to work for and under the direction and supervision of a person other than the employment agency (“the Hirer”).

Therefore, self employed persons (i.e. those who are “in business on their own account”) who are placed by the Agency are outside the scope of the Bill as are those who are employed under a Managed Service Contract (dealt with in more detail below).

In order to determine if someone is genuinely in business on their own account, the Courts have developed a number of tests which examine all aspects of the relationship, including the contractual documentation, the expectations of the parties, and their conduct, to determine the reality of the relationship. If the reality is that the individual is not in business on their own account but instead works under the direction and supervision of the Hirer, or the arrangement is an avoidance tactic, the individual is likely to fall within the scope of the Bill.

A managed service contract is based on a contract for services that sets out certain service level arrangements. The managed service contractor has responsibility for managing and delivering the service, (often catering or cleaning services), and employs, rather than supplies, the workers. The managed service contractor must be genuinely engaged in supervising and directing its workers on site on a day to day basis and must determine how and when the work is done. Therefore, having an on-site presence would not necessarily be sufficient to meet the definition of a managed service contractor.

## **What Entitlements do Agency Workers have under the Bill?**

With effect from 5<sup>th</sup> December, 2011, all agency workers are entitled to the same pay and basic working conditions to those which a comparable employee is entitled or, if there is no comparable employee, to those which a comparable employee would be entitled if one were employed. A “comparable employee” is one who works for the same employer (being the Hirer) and they both do the same work/are interchangeable with each other and their work is of equal value.

“Pay” is defined in the Bill as comprising the following;

- Basic pay;
- Shift Premium
- Piece Rates
- Overtime premium
- Unsocial hours premium
- Sunday premium where a Sunday is worked and a premium is normally paid to the comparator.

This list is exhaustive and therefore anything not included in this list falls outside the definition of “pay” for the purposes of the Bill. Therefore, occupational pension schemes, financial participation schemes, sick pay schemes, BIK and bonuses are all outside the definition of pay.

Furthermore, in respect of pay only, if the agency worker is employed under a permanent contract of employment with the Agency, and is paid between assignments, the principle of equal treatment does not apply. There are, however, certain minimum requirements that must be met in order for this exception to apply and therefore careful drafting and scrutiny of the contractual documentation between the agency and the agency worker will be necessary to ensure that such requirements are in fact met.

“Basic working and employment conditions” is defined in the Bill as follows;

- Pay (as above)
- Working time;
- Rest periods;
- Rest breaks;
- Night work;
- Annual leave;
- Public holidays
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## **Do Agency Workers have rights of access to Collective Facilities and Amenities?**

The Bill provides that agency workers must be provided with access to canteen or other similar facilities; child care facilities (such as an on-site crèche) and transport facilities. This is the only element of the Bill where there can be “objective justification” for treating the agency worker less favourably. In other words, there must be a good reason for treating the agency worker differently in this regard.

Cost may be one factor to take into account but the Hirer is unlikely to be able to rely on cost alone to justify different treatment. Practical and organisational considerations could also be a factor. Access to facilities does not mean that agency workers have an entitlement to enhanced rights. Therefore, for example, if there is a waiting list for a crèche facility, an agency worker is entitled only to join the waiting list.

The list of collective facilities in the Bill is not an exhaustive list. Therefore, along with the facilities specifically outlined above, this entitlement may extend to toilets/shower facilities; staff common rooms; waiting rooms; mother and baby rooms; vending machines and car parking. It is not anticipated that the entitlement to transport facilities will extend to company car allowances but will instead be limited to local pick up and drop offs and transport between sites.

Agency workers are also entitled to the same access to information on job vacancies in the Hirer as permanent employees. The Hirer will therefore need to ensure that agency workers are made aware of where such vacancies will appear (e.g. company intranet/notice boards etc).

## **Does the Bill apply to only new Agency Workers employed after 5<sup>th</sup> December 2011?**

No, the Bill applies to all existing agency workers, regardless of the date of assignment, who are in the Hirer on 5<sup>th</sup> December, 2011.

## **Who has Liability under the Bill – the Hirer or the Agency?**

The Agency has liability for failure to provide equal treatment in respect of pay and/or basic working and employment conditions. The Hirer has liability for failure to provide access to collective facilities and/or access to information on vacancies.

However, the Bill places an obligation on the Hirer to provide all information reasonably required by the Agency in order to ensure that the agency worker receives the entitlements to equal treatment in respect of pay and basic working and employment conditions conferred on them by the Bill. The Bill includes no list of the information required in this regard and therefore it will be a matter for interpretation in each case as to what information the agency reasonably requires to meet their obligations in this regard.

Where the Agency can show that any failure to provide equal treatment to the agency worker was attributable to the Hirer's failure to provide the Agency with the information, the Bill makes provision for the Hirer to indemnify the Agency against any resulting loss suffered by the Agency. The flow of information between the Hirer and the Agency is therefore a key element of this Bill and many agencies have already written to Hirers seeking information to meet their obligations in this regard.

### **How are alleged breaches of the Bill processed?**

Agency workers who allege contravention of their rights under the Bill must furnish their complaint to the Rights Commissioner Service of the Labour Relations Commission within 6 months of the date of the alleged breach (or 12 months of the worker can show reasonable cause for the delay). A maximum of 2 year's gross remuneration can be awarded by way of compensation under the Bill.

## **WHAT DO YOU DO NOW?**

### **1. Advice for agencies**

Agencies should urgently review their contract documentation with the Hirers. Agencies should now look at drafting indemnities/warranties for that contractual documentation, which can be included now in anticipation of the enactment of the Bill.

Agencies will need to include an obligation on the Hirers to provide information about pay and basic working conditions in order that the Agency can ensure that its temporary workers are being paid in accordance with these elements as and from the 5<sup>th</sup> December 2011. Agencies should seek information from their Hirers in writing in relation to what the Hirer is/would be paying a comparable employee. The request should be documented and retained on

file. Should the information not be forthcoming, the Agency should take reasonable steps to follow up and obtain the information from the Hirer. Such documentation will be necessary to limit the Agency's liability under the legislation.

Agencies should also look at what information they will be required to furnish to the Hirers about how individual agency workers are retained by them. Hirers will need this information in order that they can determine who exactly in their organisation is caught by the provisions of the Bill.

### **2. Advice for Hirers**

Hirers should equally review their contractual documentation with the Agency and may also wish to seek appropriate contractual protections from the Agency in respect of that Agency's compliance and confirmation as to how agency workers are retained by the agency. Hirers should also seek information from the Agency about how individual agency workers are retained (i.e. are they retained through a limited liability company or otherwise) as this information will enable the Hirer to determine who in their organisation is caught by the Bill.

Hirers should undertake an immediate workforce audit in order that they can group workers together and determine who exactly is caught by the Bill. Hirers then need to give consideration to what a comparable employee is/would be paid as and from the 5<sup>th</sup> December 2011. This information, where appropriate, will need to be furnished to the Agency in relation to the specific workers caught by the definition of agency worker as outlined above.

Hirers also need to give consideration as to who in their organisation has responsibility for liaising with the Agency and coordinating the flow of information to ensure the organisation is legally protected in so far as practicable.

The Agency and Hirer alike should obtain assistance from their legal advisors in drafting the appropriate contractual protections that can now be inserted into existing arrangements.

## **CONCLUSION**

Many questions remain unanswered by the Bill. There are issues in the Bill which are vague and allow scope for differing interpretations. However, this creates opportunity for arguing in favour of a

particular interpretation on a case by case by case basis. We in RDJ are committed and well placed to support the Agency and Hirer alike in interpreting the legislation and preparing your business for the changes required.

**For Further Advice/Assistance, please contact Jennifer Cashman, Partner, RDJ Employment Team on 021 4802700..**

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