



## Employment Law Bulletin

### AGENCY WORKERS – LATEST NEWS ON THE EU DIRECTIVE

The EU Directive on temporary agency workers must be implemented into Irish law by the 5<sup>th</sup> December next and the deadline cannot be extended. Apparently, much work has already been done on the legislation, but draft legislation in this area has not yet been published.

There is much media speculation in the last number of days on how the 5<sup>th</sup> December deadline will impact on employers and the following is the position.

Until the Minister publishes national legislation, the EU Directive does not impact on private sector employers on the 5<sup>th</sup> December next. Therefore, it is not the case, contrary to some media speculation, that on the 5<sup>th</sup> December next agency workers will become entitled to day one rights to equal treatment, as provided for under the Directive. Until the Minister transposes the Directive into national law, by introducing legislation in the area, the Directive does not impact on private sector employers.

For public sector employers, the situation is slightly different arising from the European Law Doctrine of Direct Effect. This Doctrine means that if an EU Member State fails to implement an EU law into national legislation by the specified deadline, the EU law automatically has direct effect in national law, only with the

same wording as the original EU law. Public sector employers are emanations of the State and are therefore subject to the Doctrine of Direct Effect.

Therefore, a public sector employee could sue the State for failing to implement the Directive by the deadline of the 5<sup>th</sup> December next. However, such litigation would be costly and lengthy and any damages awarded would be limited to the differential in wages or other benefits between agency workers and full time comparators over a period of time.

In the private sector, an agency worker is not able to sue a private sector employer or agency for not implementing the Directive. Therefore, private sector employers can await national legislation in this area before making any changes in their organisations.

While the Directive entitles agency workers to equal treatment with their permanent colleagues from the first day of employment in an end user organisation, the Social Partners at national level can agree a derogation that would limit this right to those who have been with their client employer for a certain period of time. For example, in the UK, a 12 week derogation has been agreed before equal treatment on pay and condition applies. The default position without a Social Partner Agreement is equal treatment from day one. No Social Partner Agreement exists to date in Ireland and derogation from day one rights to equal pay and it looks increasingly unlikely that any such agreement will be

reached. However, it is important to point out that the day one rights to equal treatment will still only apply as and when the Minister introduces national legislation in this area, which has not yet been published.

While employers therefore have to wait for legislation on this issue, to obtain clarity around exactly what entitlements arise for agency workers, there are still some steps that employers can take now to prepare themselves for the new law. Some practical advice, therefore, for employers in this area is as follows:-

- Review policies and procedures. Have you qualifying periods included in your policies and procedures for such occupational benefits such as sick pay and maternity pay? If not, then employers should consider introducing such qualifying periods, which will apply equally to agency workers as to permanent employees.
- Employers should review internal practices and procedures for signing off on temporary assignments. It is very important for any manager or other employee in an organisation, who has the authority to sign off on a temporary assignment, to be made aware that there will now be legal liability attaching in respect of those assignments.
- Employers should conduct a review of how information is provided to agencies. Much more information will require to be provided once this law comes into effect. Employers will need to address what information is given to agencies and who in the organisation will be responsible for giving this information.
- Employers should conduct a full workforce audit. This involves grouping workers into categories – agency workers simpliciter; umbrella company

employees and limited liability contractors.

- Employers should also get full visibility from agencies on how agency workers are retained by the agency (i.e. under contracts of employment with the agency or as independent contractors).
- Employers will need to consider premium payments made to agencies and whether those premium payments will need to be restructured in light of the new legislation.

Please contact any of the members of the RDJ Employment Unit for further updates on this very important issue. We will be sending out further mail shots as more developments occur.

The most important message for employers at the moment is not to panic.

For further information, to receive a copy of our legal updates or to discuss any aspect of employment law please contact a member of our employment law team:

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