

STATUTORY RULES OF NORTHERN IRELAND

2011 No. 350

THE AGENCY WORKERS REGULATIONS (NORTHERN IRELAND) 2011

PROSPECTIVE

PART 2

Rights

Rights of agency workers in relation to the basic working and employment conditions

5.—(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

- (a) other than by using the services of a temporary work agency; and
- (b) at the time the qualifying period commenced.

(2) For the purposes of paragraph (1), the basic working and employment conditions are —

- (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer,
- (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,

whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.

(3) Paragraph (1) shall be deemed to have been complied with where—

- (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
- (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

- (a) both that employee and the agency worker are—
 - (i) working for and under the supervision and direction of the hirer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
- (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies

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the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

- (5) An employee is not a comparable employee if that employee's employment has ceased.
- (6) This regulation is subject to regulation 10.

Commencement Information

II [Reg. 5](#) in operation at 5.12.2011, see [reg. 1](#)

Relevant terms and conditions

6.—(1) In regulation 5(2) and (3) “relevant terms and conditions” means terms and conditions relating to—

- (a) pay;
- (b) the duration of working time;
- (c) night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.

(2) For the purposes of paragraph (1)(a), “pay” means any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

(3) Those payments or rewards are—

- (a) any payment by way of occupational sick pay;
- (b) any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office;
- (c) any payment in respect of maternity, paternity or adoption leave;
- (d) any payment referable to the worker's redundancy;
- (e) any payment or reward made pursuant to a financial participation scheme;
- (f) any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service;
- (g) any payment for time off under Part VII of the 1996 Order⁽¹⁾ (payment for time off for carrying out trade union duties etc);
- (h) a guarantee payment under Article 60 of the 1996 Order;
- (i) any payment by way of an advance under an agreement for a loan or by way of an advance of pay (but without prejudice to the application of Article 45 of the 1996 Order to any deduction made from the worker's wages in respect of any such advance);
- (j) any payment in respect of expenses incurred by the worker in carrying out the employment; and

⁽¹⁾ Article 93 of the 1996 Order was amended by Article 31(1) and (3) of the Employment (Northern Ireland) Order 2003, S.I. 2003/2902 (N.I. 15)

(k) any payment to the worker otherwise than in that person's capacity as a worker.

(4) For the purposes of paragraphs (2) and (3) any monetary value attaching to any payment or benefit in kind furnished to a worker by the hirer shall not be treated as pay of the worker except any voucher or stamp which is—

- (a) of fixed value expressed in monetary terms, and
- (b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).

(5) In this regulation—

“financial participation scheme” means any scheme that offers workers of the hirer—

- (a) a distribution of shares or options, or
- (b) a share of profits in cash or in shares;

“night time”, in relation to an individual, means—

- (a) a period—
 - (i) the duration of which is not less than seven hours, and
 - (ii) which includes the period between midnight and 5 a.m.,which is determined for the purposes of these Regulations by a working time agreement, or
- (b) in default of such a determination, the period between 11 p.m. and 6 a.m.;

“night work” means work during night time;

“relevant training” means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training—

- (a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and
- (b) which is provided on a course run by that institution or person;

“rest period”, in relation to an individual, means a period which is not working time, other than a rest break or leave to which that individual is entitled either under the Working Time Regulations (Northern Ireland) 1998(2) or under the contract between that individual and the employer of that individual;

“working time”, in relation to an individual means—

- (a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual,
- (b) any period during which that individual is receiving relevant training, and
- (c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations (Northern Ireland) 1998 under a working time agreement; and

“working time agreement”, in relation to an individual, means a workforce agreement within the meaning of regulation 2(2) of the Working Time Regulations (Northern Ireland) 1998, which applies to the individual any provision of—

- (a) a collective agreement which forms part of a contract between that individual and the employer of that individual, or
- (b) any other agreement in writing which is legally enforceable as between the individual and the employer of that individual.

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Commencement Information

I2 [Reg. 6](#) in operation at 5.12.2011, see [reg. 1](#)

Qualifying period

7.—(1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.

(2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.

(3) For the purposes of this regulation and regulations 8 and 9, the agency worker works in “the same role” unless—

- (a) the agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency;
- (b) the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role; and
- (c) the temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role.

(4) For the purposes of this regulation and regulation 10, any week during the whole or part of which an agency worker works during an assignment is counted as a calendar week.

(5) For the purposes of this regulation and regulations 8 and 9, when calculating whether any weeks completed with a particular hirer are continuous, where—

- (a) the agency worker has started working during an assignment, and there is a break, either between assignments or during an assignment, when the agency worker is not working,
 - (b) paragraph (8) applies to that break, and
 - (c) the agency worker returns to work in the same role with the same hirer,
- any continuous weeks during which the agency worker worked for that hirer before the break shall be carried forward and treated as continuous with any weeks during which the agency worker works for that hirer after the break.

(6) For the purposes of this regulation and regulation 8, when calculating the number of weeks during which the agency worker has worked, where the agency worker has—

- (a) started working in a role during an assignment, and
- (b) is unable to continue working for a reason described in paragraph (8)(c) or (8)(d)(i), (ii) or (iii),

for the period that is covered by one or more such reasons, that agency worker shall be deemed to be working in that role with the hirer, for the original intended duration, or likely duration of the assignment, whichever is the longer.

(7) Where—

- (a) an assignment ends on grounds which are maternity grounds within the meaning of Article 100A of the 1996 Order, and
- (b) the agency worker is deemed to be working in that role in accordance with paragraph (6),

the fact that an agency worker is actually working in another role, whether for the same or a different hirer during the period mentioned in paragraph (6) or any part of that period, does not affect the operation of that paragraph.

(8) This paragraph applies where there is a break between assignments, or during an assignment, when the agency worker is not working and the break is—

- (a) for any reason and the break is not more than six calendar weeks;
- (b) wholly due to the fact that the agency worker is incapable of working in consequence of sickness or injury, and the requirements of paragraph (9) are satisfied;
- (c) related to pregnancy, childbirth or maternity and is at a time in a protected period;
- (d) wholly for the purpose of taking time off or leave, whether statutory or contractual, to which the agency worker is otherwise entitled which is—
 - (i) ordinary, compulsory or additional maternity leave;
 - (ii) ordinary or additional adoption leave;
 - (iii) paternity leave;
 - (iv) time off or other leave not listed in sub-paragraph (d)(i), (ii) or (iii); or
 - (v) for more than one of the reasons listed in sub-paragraph (d)(i) to (iv);
- (e) wholly due to the fact that the agency worker is required to attend at any place in pursuance of being summoned for service as a juror under the Juries (Northern Ireland) Order 1996⁽³⁾, or the Coroners Act (Northern Ireland) 1959⁽⁴⁾, and the break is 28 calendar weeks or less;
- (f) wholly due to a temporary cessation in the hirer’s requirement for any worker to be present at the establishment and work in a particular role, for a pre-determined period of time according to the established custom and practices of the hirer;
- (g) wholly due to a strike, lock-out or other industrial action at the hirer’s establishment; or
- (h) wholly due to more than one of the reasons listed in sub-paragraphs (b), (c), (d), (e), (f) or (g).

(9) Paragraph (8)(b) only applies where—

- (a) the break is 28 calendar weeks or less;
- (b) paragraph (8)(c) does not apply; and
- (c) if required to do so by the temporary work agency, the agency worker has provided such written medical evidence as may reasonably be required.

(10) For the purposes of paragraph (8)(c) a protected period begins at the start of the pregnancy, and the protected period associated with any particular pregnancy ends at the end of the 26 weeks beginning with childbirth or, if earlier, when the agency worker returns to work.

(11) For the purposes of paragraph (10) “childbirth” means the birth of a living child or the birth of a child whether living or dead after 24 weeks of pregnancy.

(12) Time spent by an agency worker working during an assignment before 5th December 2011 does not count for the purposes of this regulation.

Commencement Information

I3 [Reg. 7](#) in operation at 5.12.2011, see [reg.1](#)

⁽³⁾ S.I.1996/1141 (N.I.6)

⁽⁴⁾ 1959 c.15 (N.I.)

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Completion of the qualifying period and continuation of the regulation 5 rights

8. Where an agency worker has completed the qualifying period with a particular hirer, the rights conferred by regulation 5 shall apply and continue to apply to that agency worker in relation to that particular hirer unless—

- (a) that agency worker is no longer working in the same role, within the meaning of regulation 7(3), with that hirer; or
- (b) there is a break between assignments or during the assignment, when the agency worker is not working, to which regulation 7(8) does not apply.

Commencement Information

I4 Reg. 8 in operation at 5.12.2011, see reg.1

Structure of assignments

9.—(1) Notwithstanding paragraphs (1) and (2) of regulation 7, and regulation 8, if paragraphs (3) and (4) apply an agency worker shall be treated as having completed the qualifying period from the time at which the agency worker would have completed the qualifying period but for the structure of the assignment or assignments mentioned in paragraph (3).

(2) Notwithstanding paragraphs (1) and (2) of regulation 7, and regulation 8, if paragraphs (3) and (4) apply an agency worker who has completed the qualifying period and—

- (a) is no longer entitled to the rights conferred by regulation 5, but
- (b) would be so entitled but for the structure of the assignment or assignments mentioned in paragraph (3),

shall be treated as continuing to be entitled to those rights from the time at which the agency worker completed that period.

(3) This paragraph applies when an agency worker has—

- (a) completed two or more assignments with a hirer (H),
- (b) completed at least one assignment with H and one or more earlier assignments with hirers connected to H, or
- (c) worked in more than two roles during an assignment with H, and on at least two occasions has worked in a role that was not the “same role” as the previous role within the meaning of regulation 7(3).

(4) This paragraph applies where—

- (a) the most likely explanation for the structure of the assignment, or assignments, mentioned in paragraph (3) is that H, or the temporary work agency supplying the agency worker to H, or, where applicable, H and one or more hirers connected to H, intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, the rights conferred by regulation 5; and
- (b) the agency worker would be entitled to, or would continue to be entitled to, the rights conferred by regulation 5 in relation to H, but for that structure.

(5) The following matters in particular shall be taken into account in determining whether the structure of the assignment or assignments mentioned in paragraph (3) shows that the most likely explanation for it is that mentioned in paragraph (4)(a)—

- (a) the length of the assignments;
- (b) the number of assignments with H and, where applicable, hirers connected to H;

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- (c) the number of times the agency worker has worked in a new role with H and, where applicable, hirers connected to H, and that new role is not the “same role” within the meaning of regulation 7(3);
- (d) the number of times the agency worker has returned to work in the same role within the meaning of regulation 7(3) with H and, where applicable, hirers connected to H;
- (e) the period of any break between assignments with H and, where applicable, hirers connected to H.

(6) For the purposes of this regulation hirers are connected to a hirer if one hirer (directly or indirectly) has control of the other hirer or a third person (directly or indirectly) has control of both hirers.

Commencement Information

I5 [Reg. 9](#) in operation at 5.12.2011, see [reg.1](#)

Permanent contracts providing for pay between assignments

10.—(1) To the extent to which it relates to pay, regulation 5 does not have effect in relation to an agency worker who has a permanent contract of employment with a temporary work agency if—

- (a) the contract of employment was entered into before the beginning of the first assignment under that contract and includes terms and conditions in writing relating to—
 - (i) the minimum scale or rate of remuneration or the method of calculating remuneration,
 - (ii) the location or locations where the agency worker may be expected to work,
 - (iii) the expected hours of work during any assignment,
 - (iv) the maximum number of hours of work that the agency worker may be required to work each week during any assignment,
 - (v) the minimum hours of work per week that may be offered to the agency worker during any assignment provided that it is a minimum of at least one hour, and
 - (vi) the nature of the work that the agency worker may expect to be offered including any relevant requirements relating to qualifications or experience;
- (b) the contract of employment contains a statement that the effect of entering into it is that the employee does not, during the currency of the contract, have any entitlement to the rights conferred by regulation 5 insofar as they relate to pay;
- (c) during any period under the contract after the end of the first assignment under that contract in which the agency worker is not working temporarily for and under the supervision and direction of a hirer but is available to do so—
 - (i) the temporary work agency takes reasonable steps to seek suitable work for the agency worker,
 - (ii) if suitable work is available, the temporary work agency offers the agency worker to be proposed to a hirer who is offering such work, and
 - (iii) the temporary work agency pays the agency worker a minimum amount of remuneration in respect of that period (“the minimum amount”); and
- (d) the temporary work agency does not terminate the contract of employment until it has complied with its obligations in sub-paragraph (c) for an aggregate of not less than four calendar weeks during the contract.

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(2) For work to be suitable for the purposes of paragraph (1)(c) the nature of the work, and the terms and conditions applicable to the agency worker whilst performing the work, must not differ from the nature of the work and the terms and conditions included in the contract of employment under paragraph (1)(a).

Commencement Information

I6 [Reg. 10](#) in operation at 5.12.2011, see [reg.1](#)

Calculating the minimum amount of pay

11.—(1) Subject to paragraph (3), the minimum amount to be paid to the agency worker during a pay reference period falling within a period to which regulation 10(1)(c) applies shall not be less than 50% of the pay paid to the agency worker in the relevant pay reference period.

(2) For the purposes of paragraph (1), the relevant pay reference period shall be the pay reference period in which the agency worker received the highest level of pay which fell—

- (a) within the 12 weeks immediately preceding the end of the previous assignment, where the assignment lasted for longer than 12 weeks, or
- (b) during the assignment, where the assignment lasted for 12 or fewer weeks.

(3) The minimum amount shall be not less than the amount that the agency worker would have been entitled to for the hours worked in the relevant pay reference period if the provisions of the National Minimum Wage Regulations 1999 applied⁽⁵⁾.

(4) For the purposes of calculating the minimum amount as set out in paragraph (1), only payments in respect of basic pay whether by way of annual salary, payments for actual time worked or by reference to output or otherwise shall be taken into account.

(5) For the purposes of this regulation, “pay reference period” is a month or, in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

Commencement Information

I7 [Reg. 11](#) in operation at 5.12.2011, see [reg.1](#)

Rights of agency workers in relation to access to collective facilities and amenities

12.—(1) An agency worker has during an assignment the right to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer.

(2) The rights conferred by paragraph (1) apply only if the less favourable treatment is not justified on objective grounds.

(3) “Collective facilities and amenities” includes, in particular—

- (a) canteen or other similar facilities;
- (b) child care facilities; and
- (c) transport services.

(4) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(5) S.I. 1999/584; relevant amending instruments are S.I. 2000/1989, S.I. 2001/2673, S.I. 2002/1999, S.I. 2003/1923, S.I. 2004/1930, S.I. 2005/2019, S.I. 2006/2001, S.I. 2007/2318, S.I. 2008/1894, S.I. 2009/1902, S.I. 2010/1901, S.I. 2010/3001

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- (a) both that individual and the agency worker are—
 - (i) working for and under the supervision and direction of the hirer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills;
- (b) that individual works or is based at the same establishment as the agency worker or, where there is no comparable worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements; and
- (c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

Commencement Information

18 [Reg. 12](#) in operation at 5.12.2011, see [reg.1](#)

Rights of agency workers in relation to access to employment

13.—(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

(2) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

- (a) both that individual and the agency worker are—
 - (i) working for and under the supervision and direction of the hirer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills;
- (b) that individual works or is based at the same establishment as the agency worker; and
- (c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

(3) For the purposes of paragraph (1), an individual is not a comparable worker if that individual's employment with the hirer has ceased.

(4) For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment.

Commencement Information

19 [Reg. 13](#) in operation at 5.12.2011, see [reg.1](#)

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