

EXPLANATORY MEMORANDUM TO
THE AGENCY WORKERS REGULATIONS (NORTHERN IRELAND) 2011
SR 2011 No. 350

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Department for Employment and Learning to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under the powers conferred by section 2(2) of the European Communities Act 1972 and Articles 17(1), (2) and (5) and 55(2) of the Health and Safety at Work (Northern Ireland) Order 1978 as well as paragraphs 6, 7 and 14(1) of Schedule 3 to that Order and is subject to the negative resolution procedure.

2. Purpose

- 2.1. The purpose of this Statutory Rule is to transpose EU Directive 2008/104/EC on temporary agency work (the Directive) into domestic law. The implementation is based on the Social Partners Agreement (the Agreement) between the UK Government, Confederation of British Industry (CBI) and the Trades Union Congress (TUC). The Agreement provided that agency workers should be entitled to equal treatment after 12 weeks in the same job with the same hirer. The Directive must be transposed by Member States by 5 December 2011.

3. Background

- 3.1. In December 2008, the European Parliament and the Council of the European Union agreed a Directive on conditions for temporary agency workers (Directive 2008/104/EC). The aim of the Directive is to ensure the protection of temporary agency workers by applying the principle of equal treatment as set out in Article 5 of the Directive. This provides that the basic working and employment conditions (i.e. duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay) of temporary agency workers should be, for the duration of their assignment with a hirer, at least those that would apply if they had been recruited directly by that hirer to occupy the same job. The Directive must be transposed in Northern Ireland by 5 December 2011. A copy of the Transposition Note is attached.
- 3.2. The default position of the Directive is that equal treatment rights should apply from the first day of an assignment. However, Article 5(4) of the Directive provides for a 'qualifying period' for equal treatment, on the basis of an agreement between the social partners at national level. The Agreement in May 2008 between UK social partners (UK Government, CBI and TUC) provided that the entitlement of temporary agency workers to equal treatment would come into effect after a 12 week qualifying period rather than on Day One. The Agreement has application in Northern Ireland and the policy development for this Statutory Rule has been based upon this Agreement.

- 3.3. The proposed Statutory Rule is made primarily using powers under section 2(2) of the European Communities Act 1972. Certain aspects of this Statutory Rule, however, are provided for under powers conferred by the Health and Safety at Work (Northern Ireland) Order 1978. The responsibility for this legislation rests with the Department of Enterprise, Trade and Investment (DETI). In November 2010, DETI Minister Arlene Foster agreed to DEL officials making the necessary amendments using these Health and Safety powers. There is no other existing legislation in this area. The Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 govern the conduct of the recruitment industry in Northern Ireland.

4. Consultation

- 4.1. The Department published a consultation on the policy proposals and the draft Regulations which ran from 15 December 2010 to 11 March 2011. The Department received 18 responses, 13 of which were substantive. The NI consultation took account of the outcomes of the Department for Business, Innovation and Skills (BIS) consultations in GB and, where appropriate, the Department proposed measures which were in line with those on which BIS agreed to proceed and which are legislated for within the Agency Workers Regulations 2010.
- 4.2. Departmental officials met with a number of agencies and employers (both in the public and the private sector) during and after the consultation period and participated in private sector briefing seminars on the implementation and impact of the proposed Statutory Rule in Northern Ireland.
- 4.3. In general, the issues addressed in the consultation covered the definition of agency worker, the definition of pay, the degree to which bonuses should be considered part of an agency worker's pay, the minimum period of a break between assignments before an agency worker's accrued service with a hirer should be reset (as well as other breaks which may pause or stop the agency worker's 'clock'), anti-avoidance measures, the option of permanent contracts of employment (aka the Swedish Derogation), changing assignments for health and safety reasons, access to both facilities and information on vacancies, providing information to workers' representatives, establishing equal treatment, liability and dispute resolution.
- 4.4. In general employer and agency representatives considered that the proposals imposed unnecessary additional burdens and costs, while representatives of workers considered that the proposals did not go far enough in establishing additional rights for agency workers.
- 4.5. Departmental officials gave evidence to the Assembly Committee for Employment and Learning at its meetings on 1 June and 15 June 2011 and a 'Take Note' debate on the issues raised, as requested by the Committee, was held in the Assembly on 21 June 2011.

5. Equality Impact

- 5.1. A Preliminary Equality Impact Assessment was carried out, concluding that the proposals benefited all agency workers but that benefits are

greatest amongst those groups who are over represented (compared with all employees) in the agency worker sectors (e.g. those in the 16-24 year old age group). A fuller assessment was not considered necessary. Full consideration was given to compliance with Section 75 of the Northern Ireland Act 1998.

6. Regulatory Impact

- 6.1. A Partial Regulatory Impact Assessment (PRIA) was carried out on the proposals and this was included with the consultation document. The Department commissioned research to be carried out into the size and nature of the recruitment industry in Northern Ireland. The research indicated that, in September 2009, there were 270 companies operating in the recruitment sector. More than 84,000 individuals were registered with an employment agency or business in Northern Ireland and more than 22,000 individuals were employed on a temporary basis through an employment agency. This research was used, alongside relevant UK research, to assess the impacts of the proposals in Northern Ireland. Copies of the PRIA are available from the Department upon request.
- 6.2. The PRIA explored two options for providing equal treatment to agency workers in Northern Ireland: equal treatment from Day 1 and qualification for equal treatment after 12 weeks working in a given job. Based on the 12 week qualifying period option, the PRIA indicated costs of £300m and benefits of £220m over 10 years, resulting in £80m net costs over 10 years. Private and public sector employers face annual increased costs of up to £27m and £6.5m respectively, while the main annual benefits, up to £19.2m and £6.4m, will fall to the agency workers most affected and to HM Treasury respectively.

7. Financial Implications

- 7.1. The impact of the implementation of the Directive based on the 12-week qualifying period is estimated to result in costs of £300m and benefits of £220m over 10 years, resulting in £80m net costs over 10 years. The 12 weeks option reduces the costs to businesses by roughly 60% compared to costs under the Day 1 option.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Statutory Rule was sent to the Departmental Solicitor's Office (DSO) for scrutiny and clearance and their advice was that the Statutory Rule is compliant with Section 24 of the Northern Ireland Act 1998. The equivalent Statutory Instrument in GB (the Agency Workers Regulations 2010) has been deemed compatible with the European Convention on Human Rights.

9. EU Implications

- 9.1. The purpose of the Statutory Rule is to transpose into domestic law the European Parliament and the Council of the European Union's Directive on equal treatment for temporary agency workers (Directive 2008/104/EC). Transposition has already been completed in GB through the Agency Workers Regulations 2010, which came into force on 1 October 2011.

- 9.2. The Department intends to bring this Statutory Rule into operation on 5 December 2011, the deadline for transposition. This will ensure UK-wide transposition. Failure to transpose the Directive before the deadline could leave the Department open to infraction proceedings by the European Court.

10. Parity or Replicatory Measure

- 10.1. BIS has already made the Agency Workers Regulations 2010 (S.R. 2010 No. 93). BIS also made some minor amendments to these Regulations through the Agency Workers (Amendment) Regulations 2011 (S.R. 2011 No. 1941). The amending Regulations correct drafting errors in the original Regulations.

11. Additional Information

- 11.1. Not applicable

The Agency Workers Regulations (Northern Ireland) 2011: Transposition Note

This Transposition Note, in tabular form, explains how the Agency Workers Regulations (Northern Ireland) 2011 S.R. 2011 No. 350 (the Regulations) transpose Directive 2008/104/EC of 19 November 2008 on temporary agency work (the Directive).

The table seeks to explain how the main elements of the Directive are being transposed in relation to Northern Ireland, including cross-references to the specific provisions of the Regulations being made by the Department for Employment and Learning.

These Regulations do more than is necessary to implement the Directive only in one respect.

The Regulations' extension to pregnant agency workers of the right to paid time off for ante-natal appointments and health and safety protections in respect of **all** relevant identified workplace risks, where those risks are not directly related to basic working and employment conditions, goes beyond what is strictly necessary for the implementation of the Directive. However, the Department believes it right to provide these protections in the context of legislation to improve the position of pregnant agency workers.

Transposition Table – Agency Workers Regulations (Northern Ireland) 2011

| Article | Objective | Implementation | Regulations Cross-reference |
|----------------|--|---|--|
| 1 | Sets out the scope of the Directive. | The Regulations reflect the scope of the Directive, but no specific implementation is required. | No specific implementation required. |
| 2 | Sets out the objectives of the Directive. | No implementation required. | No specific implementation required. |
| 3 | Defines terms used in the Directive. | The Regulations reproduce the definitions with certain modifications so as to make them consistent with domestic law | Regulations 2, 3, 4 and 6 |
| 4 | Requires Member States to review any restrictions or prohibitions on the use of temporary agency work, and provides that these can be justified only on the grounds of general interest (e.g. health and safety requirements at work). | The Department has reviewed legislation applying in Northern Ireland and does not believe there are any restrictions or prohibitions on the use of temporary agency workers which are not justified. | No specific implementation necessary. |
| 5.1 | The basic working and employment conditions of an agency worker during an assignment shall be the same as if they had been recruited directly. | The Regulations provide the right to be given the same terms and conditions on pay, the duration of working time, night work, rest period, rest breaks and annual leave as the agency worker would have been entitled to if recruited directly. These apply after completion of the qualifying period (see Art. 5.4 below). | Regulations 5 and 6 |

| | | | |
|-----|---|---|------------------------------|
| 5.1 | Protection of specified groups, and equal treatment to combat discrimination. | <p>In relation to pregnant women and nursing mothers, certain rights have been extended to agency workers. In particular, to provide that hirers will need to make adjustments to protect an agency worker who is pregnant or a new mother from identified risks. Where this is not reasonable, it will fall to the agency to offer alternative work or, if this is not possible, pay the agency worker for the duration of the assignment.</p> <p>In relation to other groups mentioned in Article 5.1(a) and in relation to Article 5.2, no specific provision is needed to implement. Under the law in Northern Ireland, the legislation in force on the protection of children and young people already applies to agency workers and similarly for discrimination law.</p> | Schedule 2, Parts 1 and 2 |
| 5.2 | Pay between assignments by way of derogation from Article 5.1 | The derogation is applied to an agency worker who has a permanent contract with a temporary work agency in the specified form, including a statement that the employee does not have any entitlement to the regulation 5 rights so far as they relate to pay. The Regulations also provide for a minimum permitted amount of pay between assignments. | Regulations 10 and 11 |
| 5.3 | Derogation from equal treatment principles in Article 5.1 by way of collective agreement. | The Regulations do not make use of this derogation. | No implementation necessary. |

| | | | |
|-----|--|---|------------------------|
| 5.4 | Derogation from equal treatment principles in Article 5.1 by way of social partner agreement, at national level, including possible qualifying period. | The Social Partners Agreement of 20 May 2008 between CBI and TUC provided for a 12 week qualifying period. Details of how this qualifying period operates, including the effect of breaks between and during assignments, are set out in the Regulations. | Regulations 7 and 8. |
| 5.5 | Member States are to take appropriate measures to prevent misuse, in particular successive assignments designed to circumvent the provisions of the Directive. | <p>A break of up to 6 weeks (or more than 6 weeks in certain specified circumstances) can be taken between or during assignments and this does not lead to the qualifying period starting again, or losing the entitlement where the 12 weeks has been completed.</p> <p>During an assignment the qualifying period only starts again when the agency worker is working in a new role that is substantively different, and the worker has been informed in writing of the type of work they will be required to do in the new role.</p> <p>Where the assignments are structured to circumvent the provisions of the Regulations with regard to rights to basic working and employment conditions, the worker can be treated as being entitled to those rights, and tribunals can award an additional amount of up to £5,000 payable to the agency worker.</p> | Regulations 7, 8 and 9 |
| 6.1 | Agency workers are to be informed of vacant posts in the hirer's undertaking. | The Regulations give agency workers the right to be informed of relevant vacant posts within the hirer, to give them the same opportunity as a comparable worker to find permanent employment. | Regulation 13. |

| | | | |
|-----|--|---|-------------------------------------|
| 6.2 | Ensuring that restrictions (apart from reasonable recompense) on the conclusion of contracts of employment between agency workers and hirer after assignments are null and void. | Regulation 10 of the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 already makes restrictions upon an agency worker seeking work elsewhere than via the temporary work agency unlawful, permitting only a reasonable 'transfer fee' where an agency worker is recruited by the user undertaking. | No further implementation required. |
| 6.3 | Prevents temporary work agencies charging agency workers fees in exchange for arranging for them to be recruited by a user undertaking or for concluding a contract of employment after an assignment there. | Regulation 6 of the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 already prohibits restrictions upon an agency worker seeking work elsewhere via detrimental contractual terms – such as fees. | No further implementation required. |
| 6.4 | Agency workers are to be given access to collective facilities and amenities in the undertaking under the same conditions as directly recruited workers. | The Regulations give agency workers the right to be treated no less favourably than a comparable worker in relation to collective facilities and amenities (including canteen and child care facilities and transport services) provided by the hirer. | Regulation 12 |
| 7 | Makes provision for agency workers to count towards employee number thresholds, under which representative bodies under Community and national law are to be formed at the temporary work agency or user undertaking | The Regulations contain amendments to listed primary and secondary legislation, to count agency workers towards thresholds at which representative bodies are to be formed at a temporary work agency. | Schedule 2, Parts 1 and 2 |

| | | | |
|----|--|---|-----------------------------------|
| 8 | <p>Makes provision for disclosure of information relating to use of agency workers to representative bodies under Community and national law</p> | <p>The Regulations contain amendments to listed primary and secondary legislation, to provide for disclosure of suitable information as to use of agency workers where information is to be disclosed to representatives in relation to the employment situation. In relation to health and safety issues, existing legislation provides for any necessary disclosure via regulation 7(4)(b) of the Management of Health and Safety at Work Regulations (Northern Ireland) 2000.</p> | <p>Schedule 2, Parts 1 and 2,</p> |
| 10 | <p>Member States must provide for appropriate penalties which must be effective, proportionate and dissuasive. Workers shall have adequate means of enforcing the obligations.</p> | <p>The Regulations contain provisions in relation to liability, restrictions on contracting out of the rights and duties under the Regulations, and the provision of information to support claims. Agency workers are protected against unfair dismissal or detriment as a result of bringing proceedings or exercising rights under the Regulations.</p> <p>Agency workers can bring a claim to an industrial tribunal which can award compensation, and can recommend the hirer or agency take specific action.</p> <p>In most circumstances any award of compensation should not be less than two weeks' pay.</p> <p>Where assignments have been structured to circumvent the provisions of the Regulations, an additional award of up to £5,000 can be made (see Article 5.5 above).</p> | <p>Regulations 14 to 20.</p> |