Agency Workers Regulations 2010: The Final Countdown

With year end fast approaching, many businesses are beginning their final preparations for 2012. However, for those businesses which engage temporary agency workers, a different deadline is looming – 24 December 2011. This is a key date as it marks the first point at which temporary agency workers can qualify for equal treatment under the Agency Workers Regulations 2010.

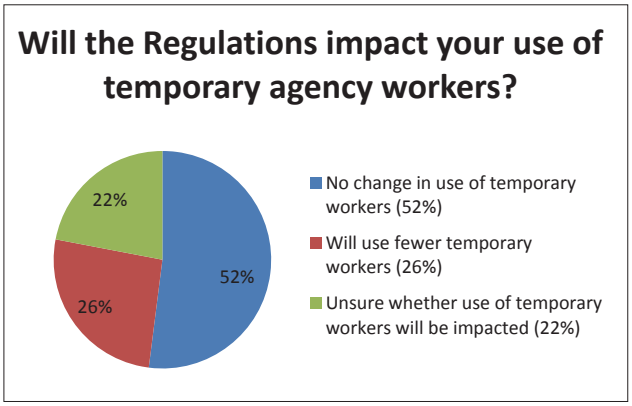
In our previous updates, we looked at the legal framework of the Regulations and provided guidance on how you can manage the impact of the Regulations on your business (*Guidance note – April 2011* and *Managing the impact – June 2011*). In this update, we summarise the results of a client survey we conducted recently, which examined the approach 30 different organisations are taking towards the Regulations and highlights some of the key issues facing businesses which engage temporary agency workers.

"Our survey says.....

- ***...most businesses will continue to use temporary agency workers despite the introduction of the Regulations...."***

The results of our survey indicate that a small majority (52%) of those questioned will continue to use temporary agency workers despite the introduction of the Regulations, whereas only 26% of respondents said that they would use fewer agency workers after 1 October 2011. Interestingly, 22% of those surveyed were still unsure of what impact the Regulations would have on their use of temporary agency workers.

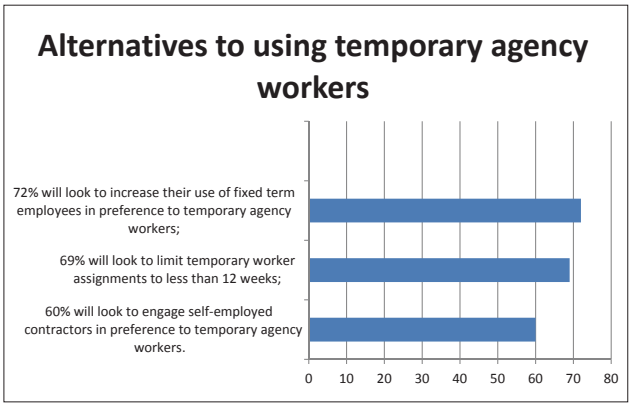
Our results show a similar trend to that found by the CBI in its Employment Trends questionnaire, which surveyed 462 UK companies and was conducted between August and September 2011, shortly before the introduction of the Regulations. Whilst the CBI found that 16% of its respondents planned to increase their temporary work force, 20% of employers were planning to reduce their use of temporary workers as a result of the Regulations.



Given the introduction of the Regulations and the associated responsibilities and obligations which arise for hirers, it will be important for those businesses which have not yet formalised their approach to do so as soon as possible, and in any event before 24 December 2011.

- ***"...although certain alternatives are being considered".***

Whilst most respondents indicated that the introduction of the Regulations will not impact their use of temporary agency workers, our survey revealed that a number of them are currently considering alternatives. The most popular alternatives being considered are set out in the table below:



Other potential alternatives found less favour. For example, only 5% of those who participated in the survey were considering introducing an in-house staffing bank of directly recruited casual workers. Furthermore, only 5% of respondents would consider outsourcing discrete services that are currently performed by temporary agency workers to external third parties, whilst none of the organisations are considering increasing overtime amongst existing staff in order to cover tasks usually dealt with by temporary agency workers.

Whilst it is inevitable that the introduction of the Regulations has led to businesses looking at alternatives, it is worth bearing in mind that these alternative options are not without risk.

- For example, in the case of fixed term employees, it is important to remember that they are entitled to special protection against discrimination. A fixed-term employee has the right not to be treated less favourably than a comparable permanent employee as regards the terms of their contract or by being subjected to any other detriment by any act, or deliberate failure to act, of their employer. As with all other strands of discrimination law, compensation for a successful fixed-term employee discrimination claim is potentially unlimited. Workers also benefit from protection against discrimination under the Equality Act 2010 in the same way as employees.
- In the case of self-employed contractors, whilst it is clear that they are not intended to be covered by the Regulations, this is only the case if they are genuinely in business on their own account. Government guidance on the Regulations makes clear that simply putting earnings through a limited company would not of itself put individuals beyond the possible scope of the Regulations. Consequently, a "sham" contractor arrangement, whereby the relationship between the individual, agency and hirer remains in essence a tri-partite relationship, and a hirer is not a client or customer of such individual, is likely to fall foul of the Regulations.
- Finally, when seeking to limit the number or length of assignments to be carried out by a temporary agency worker, there are anti-avoidance provisions in the Regulations that address situations where a pattern of assignments emerges that is designed deliberately to deprive an agency worker of his or her entitlement.

- ***"...almost all businesses which engage temporary agency workers are reviewing their relationships with agencies and almost half of respondents are considering training for staff on the Regulations."***

95% of organisations surveyed have carried out, or are planning to carry out, a review of their temporary worker arrangements, with 86% hoping to engage with fewer agencies and/or to review their agency relationships. Given the approaching deadline of 24 December 2011, we recommend that businesses which have not already carried out a review of their temporary worker arrangements should do so as soon as possible in order to:

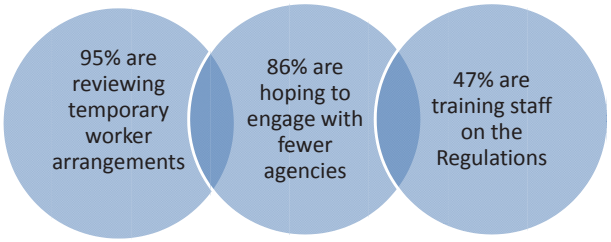
(a) understand the potential impact which the Regulations may have on their business;

(b) identify any risk factors/potential liabilities which arise as a result of the Regulations; and

(c) take steps to minimise those potential liabilities/risk factors.

Giving consideration to whether your business should engage with fewer agencies and/or negotiating exclusivity deals with your agency partners could help in the long term e.g. by reducing the administrative burden associated with engaging temporary agency workers under the Regulations and by keeping costs down (particularly if agency partners agree to absorb some of the additional costs incurred as a result of the introduction of the Regulations in return for exclusivity arrangements).

In addition to reviewing relationships with agency partners, our survey also showed that a number of our clients are considering their own internal processes regarding the Regulations with 47% of respondents introducing (or planning to introduce) training on the Regulations for staff involved with recruitment. This should help avoid inadvertent breaches of the Regulations.



- ***"...the Swedish derogation is not being implemented in practice"***

Finally, despite significant industry and press speculation prior to the Regulations being introduced, the so-called Swedish derogation does not appear to be being implemented in practice. Under the Swedish derogation or "permanent contract exclusion" model, agency workers cannot claim their right to equal pay if they are employed by an agency under a contract of employment which meets specified criteria (*See our June 2011 update for further detail on the Swedish derogation - Click here*). None of the respondents who took part in our survey nor the agencies they work with had, to their knowledge, implemented the Swedish derogation and none were considering implementing it in the future. However, the Swedish derogation is worth serious consideration by hiring organisations as it offers the only valid exemption available in respect of the "equal pay" provisions of the Regulations. Furthermore, recent press coverage has confirmed that some larger organisations in the UK are relying on the Swedish derogation as a means of circumventing the equal pay requirements of the Regulations, albeit amidst some criticism from trade unions

If you have any questions or require specific advice on the matters covered in this update, please contact:

Miriam Bruce
Associate
+44 20 3130 3695
mbruce@mayerbrown.com

Bernadette Daley
Partner
T: +44 20 3130 3667
bdaley@mayerbrown.com

0364emp
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