

**PROTECTION OF EMPLOYEES (TEMPORARY AGENCY WORK) ACT 2012**

The Protection of Employees (Temporary Agency Work) Act 2012 was enacted on 16 May 2012 to give effect to EU Directive (Directive 2008/104/EC) on temporary agency work.

The principal aim of the Act is to ensure that agency workers are treated equally in respect of pay, basic working conditions and employment conditions as if they were engaged directly by the hirer to the same job.

As initially drafted, the Act provided for the retrospective effect of its provisions from 5 December 2011. However, this has now been amended so that the only retrospective provision of the legislation relates to pay.

Therefore, a temporary agency worker can insist on the same level of pay as if he/she had been employed directly by the hirer from 5 December 2011. In relation to the non-pay aspects of the Bill such as working time, rest breaks and access to collective facilities etc., those provisions will only take effect from the commencement date of the Act.

**Application of the Act**

The Act applies to agency workers temporarily assigned by an employment agency to work for, and under the direction and supervision of, a hirer.

It does not apply to work carried out pursuant to:

* A work placement administered by FAS;
* The National Internship Scheme;
* Any vocational training, integration, or retraining scheme, financed out of public monies, as specified by Ministerial Order.

**Definitions**

* **Agency Worker**

The Act refers to an agency worker as:

*“an individual employed by an employment 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”.*

* **Employment Agency**

An employment agency according to the Act is:

*“a person (including a temporary work agency) engaged in an economic activity who employs an individual 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 first-mentioned person”.*

* **Hirer**

A hirer means:

*‘’a person engaged in an economic activity for whom and under the direction and supervision of whom, an agency worker carries out work pursuant to an agreement (whether in writing or not) between the employment agency by whom the agency worker is employed and the first-mentioned person or any other person’’.*

**Equality of Treatment**

According to the Act, all temporary agency workers are entitled to the same terms and conditions of employment as if they were directly recruited directly by the hirer:

*“… [a]n agency worker shall, for the duration of his or her assignment with a hirer, be entitled to the same basic working and employment conditions as the basic working and employment conditions to which he or she would be entitled if he or she would be entitled if he or she were employed by the hirer under a contract of employment to do work that is the same as, or similar to, the work that he or she is required to do during that assignment*.”

**What is meant by “basic working and employment conditions”?**

This means terms and conditions of employment that are required to be included in a contract of employment and relate to:

1. Pay;
2. Working time;
3. Rest periods;
4. Rest periods during the working day;
5. Night work;
6. Overtime;
7. Annual leave, or
8. Public holidays.

**What is captured by “pay”?**

Pay includes:

1. Basic pay, and
2. Any pay in excess of basic pay in respect of-
3. Shift work;
4. Piece work;
5. Overtime;
6. Unsocial hours worked, or
7. Hours worked on a Sunday

This provision relating to pay has retrospective effect as and from 5 December 2011. Therefore a temporary agency worker can insist on the same level of pay as if he/she had been directly hired by the employer from 5 December 2011.

The Act expressly excludes sick pay, payments under any pension scheme or financial participations schemes and occupational security schemes. Furthermore, there is no reference to bonus, maternity top-up, medical insurance, permanent health insurance and benefit-in-kind.

**Exclusions- Permanent Agency Workers**

Section 6(2) excludes from the scope of the Act (in relation to pay only), an agency worker who has a permanent contract of employment.

A permanent contract of employment is defined by Section 6(5) of the Act as “*a contract of employment of indefinite duration’.*

This exclusion is subject to the agency notifying the agency worker in writing that they are not entitled to the same terms and conditions in relation to pay as if they were directly employed by the hirer.

Furthermore, this exclusion only applies where the agency pays the agency worker at least half of his/her salary to which he or she was entitled to in respect of their most recent assignment.

**Anti-avoidance provision**

The effect of Section 7 of the Act is to prohibit the use of successive assignments to circumvent the provisions of the Act.

The Act provides that there shall not be a break in service in such circumstances unless there is a break of three months or more between assignments.

This would be relevant where the hirer operates an incremental scale of pay, where persons who are recruited directly receive a fixed pay rise after each year of service.

In such a case, where there is break between an agency workers assignment with a hirer, the agency worker will not commence the second assignment from the beginning but would instead return to work at the second level on the pay scale.

**Access to Employment**

Under Section 11 of the Act there is an obligation on the hirer to inform any agency worker of any vacant positions of employment. This would allow the temporary agency worker to apply for any vacant positions with the hirer.

**Prohibition on agency charging fees**

Section 13 of the Act prohibits the employment agency from charging an agency worker a fee for placement with a hirer.

The Agency can however under Section 12 of the Act obtain reasonably incurred expenses from the hirer in relation to recruitment, training and assignment of an agency worker who is subsequently employed by the hirer under a contract of employment.

**Collective facilities and amenities**

The Act also provides that an agency worker shall not be treated less favourably than an employee of the hirer in relation to *“collective facilities and amenities”*. These facilities include canteen, childcare, and transport facilities.

The right of agency workers is not absolute in this regard and allows for derogation on the part of the employer where they can demonstrate “*objective grounds*” that justify less favourable treatment of the agency worker.

**Provision of information by hirer to employment agency**

The Hirer Company must provide the employment agency with:

*“All such information in the possession of the hirer as the employment agency reasonably requires to enable the employment agency to comply with its obligations under the Act in relation to the agency worker”.*

If the hirer fails to comply with this obligation they must indemnify the employment agency of any loss incurred as a result of this failure.

**Penalisation**

Section 23 of the Act prohibits an employer from penalising or threatening to penalise an employee for:

1. Invoking any right conferred on him or her by this Act;
2. Having in good faith opposed by lawful means an act that is unlawful under this Act;
3. Making a complaint to an Garda Síochána or the Minister that a provision of the Act has been contravened;
4. Giving evidence in any proceedings under this Act;
5. Giving notice of his or intention to do any of the things referred to in the preceding paragraphs.

Penalisation is classified as any act that affects the employee to his detriment with respect to any term or condition of their employment and includes dismissal, lay-off, coercion, intimidation, demotion or a change in duties.

Section 24 enforces the same obligations as above in prohibiting a hirer from penalising any agency worker.

**Redress and Enforcement**

Schedule 2 of the Act outlines the options available to agency workers where they bring a claim for alleged breaches of the Act.

Any prospective claims for alleged breaches of the Act must be presented to a Rights Commissioner within 6 months of the alleged contravention (or within 12 months if the Rights Commissioner is satisfied that the delay is reasonable). There is a right of appeal to the Labour Court.

The possible outcomes include:

* A declaration that the complaint was or was not well founded;
* Require the employer to take a specific course of action to include reinstatement or reengagement ( in circumstances where the employee was dismissed);
* Compensation of up to 2 years remuneration.

**Conclusion**

The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.

The provisions relating to pay has retrospective effect from the 5 December 2011 and so temporary agency workers can insist on the same level of pay as if he/she had been employed directly by the employer from 5 December 2011.

In order to avoid liability under the Act agencies/hirers should:

* Undertake an audit of the terms and conditions of the agency workers it engages;
* Consider whether the terms and conditions offered to agency workers are compliant with the equal treatment requirements outlined above and that the provisions relating to pay are applied with retrospective effect;
* Review contractual documentation between agencies and hirers.