

NASUWT Guidance
on the Agency Workers Regulations (AWR)

Introduction

The Agency Workers Regulations (AWR) were introduced in October 2011 to ensure that agency workers are treated in the same way as directly employed workers carrying out the same work after a 12-week qualifying period.

Definition of ‘agency worker’

An agency worker is defined in *Regulation 3 (1)* of the AWR as an individual who:

- (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
- (b) has a contract with the temporary work agency which is:
 - i. a contract of employment with the agency, or
 - ii. any other contract with the agency to perform work or services personally for the agency.

Impact on supply teachers

The term ‘agency worker’ is applicable to supply teachers who are provided to schools by an ‘employment agency’. This arrangement results in them being paid via the agency and, as such, they are not considered an employee of the school or ‘hirer’.

Teachers introduced to a school via an agency, and subsequently directly employed by the school, are not deemed to be agency workers. Where supply teachers are employed in local authority pools of supply teachers, they are not covered by the AWR as they are remunerated directly by the local authority or school governing body. Supply teachers who work independently without using an agency are not covered.

The ‘hirer’ for agency supply teachers

The ‘hirer’ is the person or entity through whom the agency worker is supplied and the person who is responsible for supervising and directing the worker while they undertake an assignment. The ‘hirer’ is, therefore, determined in the light of the employment circumstances of each case.

- *Maintained schools*

In community, voluntary controlled or community special schools, the ‘hirer’ is the local authority. In foundation and voluntary aided schools, the hirer is the governing body.

- *Independent schools*

In independent schools, the employer may be the governing body/board, trustees or the proprietor.

- *Multi-academy trusts (MATs), stand-alone academies, free schools and trust schools*

In these organisations, the ‘hirer’ is the proprietor, person or organisation through whom the worker is supplied and who has responsibility for the supervision and direction of that worker.

Within MATs, this responsibility could be delegated to each individual school, or it could be carried out by the overarching organisation.

Agency workers’ rights

Rights under the AWR fall into two categories.

Day-one rights

With effect from the first day of an assignment (temporary work provided by an agency), supply teachers have the right, under *Regulation 12*, of equal access to collective facilities and amenities. This includes access to childcare provision, the use of the canteen and staff room, car parking and the provision of a prayer room.

In addition, they also have the right, under *Regulation 13*, to receive information on vacancies that become available during an assignment and to be given the same opportunity as directly recruited workers to gain permanent employment with the ‘hirer’.

Hirers can only refuse supply workers access to facilities if they can justify objectively the refusal. Cost alone is not seen as a reason to justify different treatment to that of directly employed workers. Practical and organisational considerations could also be a factor.

However, even when there is an objective justification, it is good practice for hirers to avoid excluding agency workers altogether.

The hirer is responsible for providing equal treatment for day-one rights and is liable for any breach of this obligation, not the employment agency.

The hirer could either provide agency workers with information about their facilities – for example, as part of an induction pack – or provide information to the employment agency to pass on as part of the information about the assignment.

Rights after 12 weeks’ employment

Following 12 continuous weeks in the same ‘role’ with the ‘same hirer’, under *Regulation 5*, supply teachers employed by an agency have the right to the same ‘basic’ conditions of pay as they would have if they had been directly employed.

‘Basic’ is defined as the following:

- rate of pay;

- hours of work;
- rest breaks;
- duration of working time, e.g. if working is limited to a maximum of 48 hours a week;
- annual leave.

However, *Regulation 6* makes it clear that ‘basic’ does not extend to benefits such as:

- pension;
- occupational sick pay;
- maternity pay;
- adoption pay;
- paid time off for carrying out trade union activities;
- expenses and other benefits.

Agency supply teachers are still eligible to receive statutory sick, maternity, paternity and adoption pay and still entitled to paid time off for antenatal appointments.

Pregnant workers’ and new mothers’ rights after 12 weeks’ employment

After completing the 12-week qualifying period, pregnant agency workers will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment.

In addition to this, pregnant agency workers must be given alternative sources of paid work (at the same rate of pay as their last assignment) if they are unable to complete their assignment for health and safety reasons. If alternative work cannot be found, then they have the right to be paid by the agency for the remaining expected duration of the original assignment.

The Regulations specify that agency workers do not automatically become permanent employees of the hirer after 12 weeks of service.

The qualifying period of 12 weeks must be ‘continuous’.

However, not all breaks in service will interrupt continuity. Some breaks merely cause the continuity to ‘pause’, and others allow the qualifying period to continue irrespective.

There are no minimum hours to be worked in any week, and therefore any time spent working in any one week will mean that week being eligible towards the 12-week qualifying period. A ‘week’ is defined as a calendar week starting from the day the worker starts with the hirer (for example, Monday to Sunday). It should also be noted that the AWR are not retrospective.

Nature of break	Impact on the 12-week qualifying period
Any break for any reason of up to six calendar weeks (e.g. summer holidays)	'Pauses' the period
Annual leave, school holidays or other school closures	'Pauses' the period
Up to 28 weeks' sickness absence or jury service	'Pauses' the period
Where an agency teacher is on maternity, paternity or adoption leave	The period continues

An agency supply teacher can move between schools as long as the employer does not change and the role is substantially the same (e.g. where the 'hirer' does not change), without stopping the clock on the 12-week qualifying period.

If an agency supply teacher moves to a different assignment with a different employer then the qualifying period would have to restart.

If an agency supply teacher is working before and after a closure (e.g. the school summer holiday) and is, for example, six weeks into a qualifying period, the qualifying period would pause at the end of one term and start again at the beginning of the next as long as they return to the same job with the same hirer.

The 'same role'

The 12-week qualifying period must be spent in the same role. A role will be considered the 'same role' unless it involves a substantially different type of work. In order for the 12-week qualifying clock to be reset to zero, the 'hirer' must notify the employment agency that the work or duties have changed, and this information must be confirmed in writing to the agency worker (*Regulation 7 (3)*).

The NASUWT considers that all classroom teaching conducted by a supply teacher would be the same role irrespective of the subject and the age range of the pupils being taught in any school.

The 'same hirer'

Moving between different schools where there is a change of employer will mean that the qualifying period is broken and will have to restart, although there are provisions for 'connected hirers'.

'Connected hirers'

The NASUWT has argued successfully that where schools are maintained by the

same local authority, then the local authority should be deemed the ‘hirer’ or ‘connected hirer’ and agency supply teachers moving between local authority schools should not break their qualifying period unless taking up a substantially different role. Similarly, where schools are within, for example, the same MAT (under one employer), then continuity of employment is not broken and the 12-week qualifying period would not have to restart.

Teachers hired by ‘connected hirers’ will therefore be subject to the anti-avoidance provisions of the AWR. This argument has been accepted by the Department for Education and is reflected in the Department’s AWR supplementary guidance.

Anti-avoidance provisions

Regulation 9 seeks to prevent ‘hirers’ and employment agencies manipulating the qualifying period in a way that will prevent agency workers securing equal rights under the AWR. Some ‘hirers’ and employment agencies may seek to avoid their obligations by only hiring workers for a period of less than 12 weeks, as the Regulations do not prevent this. However, where workers are moved around ‘connected’ hirers, defined as those who are either directly or indirectly ‘controlled’ by another (e.g. the same local authority, a MAT or independent school chain operated by the same employer), or have frequent ‘breaks’ between assignments without good reason, then they can still rely on the AWR.

Schools rotating supply teachers and agencies found in breach of the anti-avoidance provisions are equally culpable. Employment Tribunals are empowered to reach a verdict of joint liability in cases where schools have colluded with agencies to breach the AWR. Compensation may be offered to cover the loss of benefits and expenses resulting directly from the breach. A Tribunal may also award an additional sum of up to £5,000, which may be apportioned between the school and agency accordingly.

Role and rate of pay

The relevant rate of pay is determined by the nature of the job. If a school requests an agency to provide a qualified teacher to carry out ‘specified work’ teaching, then they should be paid as a teacher and not a Cover Supervisor or a Teaching Assistant. ‘Specified work’ includes planning, preparing and delivering lessons and courses to pupils and assessing and reporting on the development, progress and attainment of pupils.

After the qualifying period of 12 weeks, teachers should receive the same rate of pay as directly recruited teachers (on the same pay point). In local authority maintained schools, teachers should be paid in accordance with the School Teachers’ Pay and Conditions Document (STPCD). For an agency supply teacher, this would usually be the rate of pay that they would have received had they been employed directly by the school as provided for in the STPCD. MATs, stand-alone academies, free schools, trust schools and independent schools are free to set

their own pay scales and conditions of service. Agency supply teachers in these schools should expect to be paid the same as teachers undertaking similar work and having a similar level of skills and experience.

If an employment agency is asked to supply a teacher to a school, it will need to request information from the school about the relevant terms and conditions to be applied to the agency supply teacher after 12 weeks (this should be provided prior to the 13th week). These are of course subject to the usual requirements under employment law.

‘Permanent’ contracts with agencies (the ‘Swedish Derogation’)

Under *Regulation 10* of the AWR, an agency worker is exempt from the right to equal pay. The ‘Swedish Derogation’ allows an employment agency to pay less to a supply teacher who has qualified under the AWR for equal pay, but the teacher will still be entitled to equal treatment in relation to the duration of working time, rest periods and rest breaks and annual leave (the right to time off).

In order for this to happen, the agency must offer the supply teacher a permanent contract of employment that involves paying them between assignments when there is no work. In addition to this, the employment agency must undertake the following:

- provide an employment contract before the ‘beginning of the first assignment under that contract’;
- expressly reference to the agency worker that *Regulation 5* of the AWR (the right to equal pay) is disapplied and that they are entering into a contract which is not fixed term and which means they are giving up the entitlement to equal pay;
- include terms governing minimum pay rates, location, hours, maximum hours expected on an assignment, minimum guaranteed hours (which must be at least one hour) and type of work;
- pay the teacher between assignments. This must be at least 50% of the pay the teacher received on their last assignment, or the National Minimum Wage (for those aged under 24) or National Living Wage (for those aged over 25) calculated on the basis of the hours worked on the teacher’s last assignment, whichever is the greater;
- try to find suitable assignments when the agency worker is between assignments;
- make it clear that the contract cannot be terminated until there has been an aggregate of at least four calendar weeks between assignments when the agency worker was not working, but was being paid by the agency.

The exemption under *Regulation 10* does not apply to supply teachers who are employed on a ‘zero-hours’ contract.

This is only permitted because of the pay that is received by an agency worker between assignments. If employers or agencies take measures to deprive workers of this pay, it could put them at risk of a legal challenge.

‘Sham’ contracts

Some *Regulation 10*-compliant contracts have been created purposely by agencies to look attractive to supply teachers and cost effective to schools, but in reality they are ‘sham’ contracts.

Employment Tribunals are aware of sham contracts that conceal the true relationship between the supply teacher, school and employment agency. These are likely to lead to a tribunal judgement that deems them as deliberate attempts to evade the AWR and gives rise to a joint liability award against the school and agency. Schools should guard against cost cutting and depriving supply teachers of their rightful rates of pay and entitlements.

It is important that supply teachers are aware of what they are signing up to and the potential implications their contract may have regarding the work done. Supply teachers should therefore make sure they are fully aware of the terms and conditions of the agency and find out whether or not it employs agency/supply teachers on this ‘sham’ basis.

Before entering into ‘permanent’ contracts with agencies, NASUWT members are advised to contact the Union.

Liability and remedies

Agencies have a duty under the AWR to take reasonable steps to ascertain the applicable basic pay and conditions at a school to which it supplies agency supply teachers, and to act reasonably to ensure it treats those teachers accordingly once they have qualified for equal treatment after 12 weeks.

Under *Regulation 14*, an agency can avoid liability for failing to provide equal pay if it has taken steps to ascertain what the pay rates are for comparable employees at the school, and if the school has failed to provide accurate information. The ‘hirer’ would then be culpable for breaching the AWR.

An Employment Tribunal can make an award for liability against an agency or hirer in breach of the right to equal treatment, depending upon where it finds responsibility for the breach. But failure to provide this day-one right rests solely with the hirer. The employment agency is not liable because it does not have responsibility for delivering the entitlements under this right, such as access to car parking.

As a commercial business, employment agencies will undoubtedly pass administrative costs on to schools. This will mean, in all likelihood, that there will no longer be a cost benefit to using agency teachers.

Additionally, there will likely be increased cost and litigation risks, as outlined on page 10.

Protection against victimisation

Regulation 17 provides protection against victimisation where agency workers have asserted their rights or made allegations (in good faith) that the Regulations have been breached. It would be an automatic unfair dismissal to dismiss an agency worker who is an employee for this reason alone, or principally for this reason.

Enforcing rights and entitlements

All workers have the right not to suffer detriment for enforcing their rights, as set out in *Regulation 18 (4)*. Tribunal claims should be brought within the usual three months less one day deadline from the date of the breach or where there is a series of breaches, the date of the last in the series. A Tribunal can make a declaration as to the rights of the agency worker, order minimum compensation of two weeks' pay (capped at the statutory weekly maximum) and make recommendations to the agency or hirer.

Right to receive information

Where an agency worker suspects there is a breach of the right to equal treatment under *Regulations 12 and 13* (facilities and permanent employment rights) or the right to pay and conditions under *Regulation 5*, they can make a written request under *Regulation 16* to the agency for details of the relevant school's applicable terms and conditions. The agency must reply within 28 days, providing written reasons for its actions. If it does not reply, the teacher can then make the same request direct to the employer. Where there is a suspected breach of the right to access facilities or information on vacancies, the written request should initially go to the employer.

There is no specific remedy for failure to reply, but a Tribunal can draw adverse inferences from any such failure, or from evasive or equivocal responses. The NASUWT recommends that members seek advice from the Union before making such contact.

Further legal context

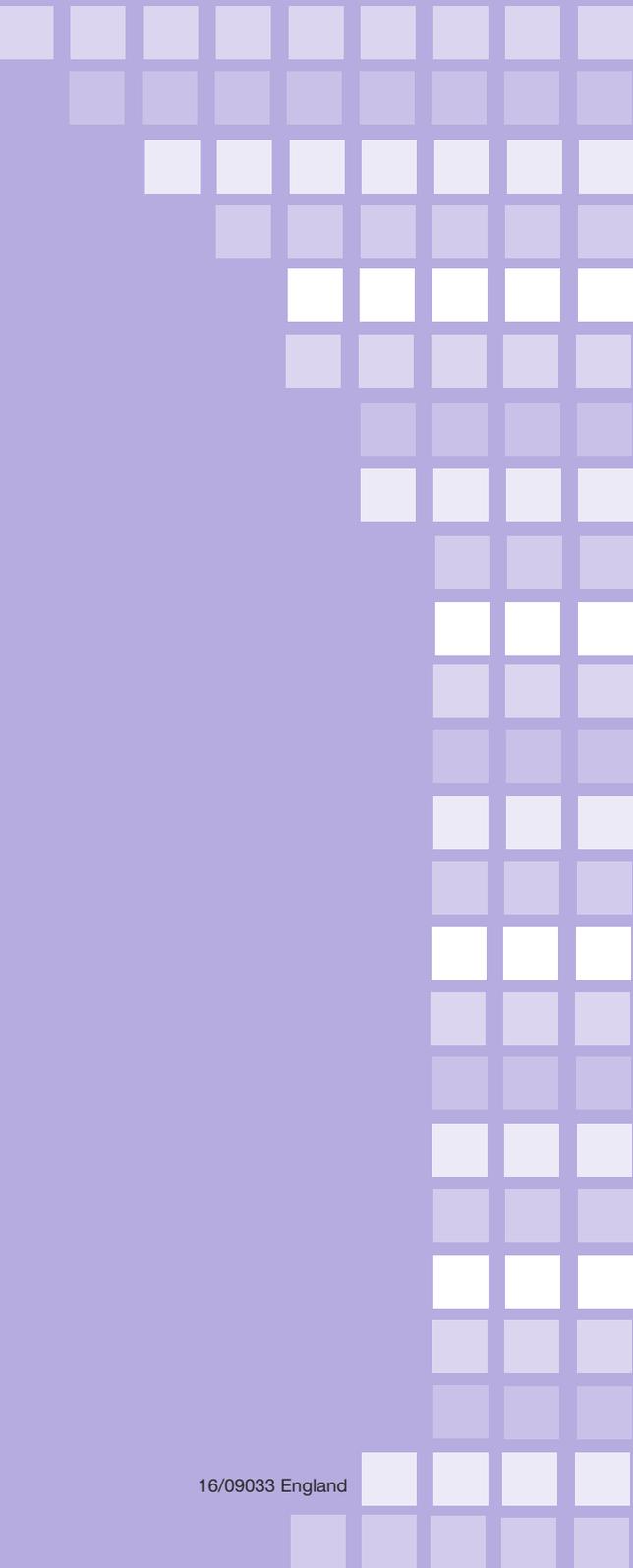
Agency workers continue to have various additional rights under existing legislation (e.g. the Conduct of Employment Agencies and Employment Businesses Regulations 2003, and the Working Time Regulations, as well as discrimination law under the Equality Act 2010).

Useful links

For further advice and guidance, please contact the NASUWT.

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