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difference

Agency Workers Policy and Procedure

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1. INTRODUCTION

1.1 Introduction

This document outlines the requirements of the Agency Workers Regulations and Wyre Council's position in engaging agency workers. It sets out guidance for managers on how agency workers should be treated while on assignment with the Council and provides a monitoring process to ensure the Regulations are being adhered to.

2. DEFINITIONS

2.1 Definitions

An agency worker is an individual who:

- (a) is supplied by a temporary work agency (TWA) to work temporarily for and under the supervision and direction of the 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.**

This may include interims who are supplied by an agency, as well as interims who operate through a Limited Company.

The Council is responsible for paying the TWA for the worker's services and the appropriate agency is responsible for paying the worker.

Agency workers are not employees of the Council - they have a contract with the appropriate agency.

2.2 A temporary work agency ("TWA") is defined as:

"a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of:

supplying individuals to work temporarily for and under the supervision and direction of hirers; or

- (a) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers."*

2.3 The provisions **do not apply** to the following:

- Those who are genuinely self-employed (e.g. sole traders)
- Those who work through their own service company who are genuinely in business on their own account (e.g. limited companies)
- Those employed under managed-service contracts
- Staff appointed through in-house temporary/casual staffing banks
- Staff directly employed by the Council who were initially introduced by an agency or employment business

3. AGENCY WORKERS AND IR35

3.1 IR35

IR35 is tax legislation that is designed to combat tax avoidance by workers supplying their services to clients via an intermediary, such as a limited company, but who would be an employee if the intermediary was not used.

If services are being provided via an agency there is a requirement on public sector bodies to provide information to the agency as to whether the IR35 rule applies. Before agreeing contracts managers must check their status using an online tool provided by HMRC - <https://www.gov.uk/guidance/check-employment-status-for-tax>.

If the council fails to notify its decision before the contract starts they become liable to account for tax and NIC.

3.2 However where the agency contracts directly with the worker as an employee and operates tax and NICs, or engages them on a self-employed basis but operate tax and NICs under agency rules, then the IR35 rules do not apply and it is therefore advisable for the manager to check how the agency operates from the outset.

Once the IR35 status has been determined by the manager, a copy should be retained by the hiring manager and a copy must also be sent to Human Resources.

4. AGENCY WORKERS RIGHTS

4.1 Agency Worker Rights

All agency workers have certain statutory protection rights:

- The right not to be discriminated against on the grounds of race, sex, age, disability, sexual orientation, religion or belief.
- Rights under the Working Time Regulations e.g. maximum number of hours and the right to statutory paid holidays.
- Rights under the whistle-blowing provisions to protection from detriment on making a protected disclosure.
- The right to receive Day 1 and 12 week entitlements as required under the Agency Workers Regulations 2010.

4.2 Day 1 Rights

From 1 October 2011, an agency worker has the right to be treated no less favourably than a comparable employee or worker in the hirer's establishment in relation to 'collective facilities and amenities' from the first day of their assignment unless treating agency workers less favourably can be objectively justified.

Agency workers have the right to the same access to certain facilities as comparable employees, i.e.:

- A canteen or other similar facilities
- Transport services (but not car allowances)
- Toilets/shower facilities
- Staff rooms (e.g. access to common room, rest room or prayer room)
- Food and drinks machines
- Car parking

Agency workers also have the right to information relating to vacancies. This excludes situations where posts are ring-fenced for redeployment purposes or the prevention of a redundancy situation.

4.3 Rights after 12 weeks

After 12 weeks service in the same job, agency workers have a right to equal treatment with a comparable worker or employee in terms of:

- Basic pay
- Overtime
- Bonus and commission related to individual productivity
- Paid holiday entitlement
- Hours of work
- Vouchers with a monetary value
- Paid time off to attend ante-natal appointments.

4.4 Agency workers are not entitled to equal treatment in respect of:

- Access to the Local Government Pension Scheme
- Occupational Sick Pay (but may be entitled to SSP from the agency)
- Redundancy Pay
- Maternity/paternity rights (but may be entitled to SMP/maternity allowance from the agency)
- Bonus related to Council performance
- Non-cash awards
- Loans or advances of salary prior to payday
- Additional discretionary and non-contractual payments

Pregnant Workers

The Equality Act 2010 provides that less favourable treatment on grounds of pregnancy or maternity is discrimination. This would mean that it would be discrimination if managers refused to accept an agency worker because she was pregnant. Similarly, it would be discrimination if a placement were terminated because of pregnancy or if the worker was subject to a detriment because of her pregnancy.

Wyre Council must carry out risk assessments for pregnant agency workers, and if they can no longer complete the duties of the original assignment for health and safety reasons, they will need to be found alternative sources of work. The pregnant worker will be considered for suitable alternative with the council if available however, ultimate responsibility to find alternative work remains with the Agency. Pregnant agency workers will also be entitled to take paid time off work to attend ante-natal appointments after the 12-week qualifying period.

Managers are advised to contact Human Resources for further guidance as soon as it becomes known that an agency worker is pregnant.

4.6

Permanent comparator

In determining to what "equal treatment" the agency worker is entitled, an agency worker can compare rights with those of an employee or worker employed directly by Wyre Council. It is not necessary that the "comparable employee" is doing exactly the same job as the agency worker; an employee or worker undertaking a broadly similar role as the agency worker will be deemed to be a sufficient comparator.

The following terms must also be met if compliance is to be proven by reference to a comparator:

- The comparator must be a current employee of the Council
- The comparator and agency worker must be engaged in the same or broadly similar work
- The comparator and agency worker must work at the same establishment, or, if there is no comparator at the agency worker's establishment, at another of the Councils establishments
- The comparator's terms and conditions are consistent with those ordinarily included in relevant contracts of employment by the Council.

5. HIRING AGENCY WORKERS

5.1

Hiring Agency Workers

Managers will continue to be responsible for the engagement and management of agency workers at service level. They will be required to monitor their own agency arrangements and will be responsible for adhering to the directive avoiding any penalties that may be placed on the Council.

The Council will use temporary agency workers to provide additional resources for short term assignments of less than 12 weeks duration.

5.2

If a vacancy is likely to be for longer than this period a proper recruitment process should be followed. However some specialist posts may be difficult to fill in which case filling the vacancy with an agency worker may be the best option.

- 5.3 Once a vacancy has been identified, all other options for filling must be explored and the appropriateness of using an agency worker considered, before deciding on an agency worker.

The Line Manager should consult with Human Resources prior to any decision to engage an agency worker and complete an Officer Delegation Report stating:

- approximate length of the assignment;
- the cost of the assignment and appropriate rate of pay;
- the budget from which the cost will be met;
- job description, person specification and advert and
- the reasons why all other options for filling the vacancy are not appropriate.

5.4 **Suppliers of agency staffing**

Line managers are required to ensure appropriate due diligence checks are carried out to ensure that the council is achieving best value for the supply of agency staff and records should be kept that demonstrate this.

5.5 **Information provided to the agency**

- **a description of the duties** the worker will be undertaking. This could be a job description, a project brief, or a summary of key duties.
- the **qualification, knowledge, experience, skills and abilities** required to do the job. This could be a person specification or summary of key requirements.
- the **working arrangements** – location, beginning and end date of the assignment, hours of work, required days of work, rest breaks, etc.

5.6 **Terms and conditions of business**

Line managers should read the terms and conditions of business carefully before agreeing to engage an agency worker.. Particular provisions to consider include:

- the fee payable for engagement of the agency worker, which is usually an hourly or day rate, plus VAT;
- the employment status (IR35)
- notice provisions from either party for termination of the temporary arrangement;
- the transfer fee payable on the switch from temporary to permanent employment;

5.7

Information to be provided by the agency

An employment agency cannot supply a temp to a hiring employer unless it has:

- taken all reasonable steps to obtain confirmation as to the identity of the temp and that he or she has the experience, training and qualifications that the hirer considers necessary, or that are required by law or a professional body;
- taken all reasonable steps to obtain confirmation that the temp is willing to work in the position that the hirer seeks to fill;
- This information in respect of the temp must be supplied to the hiring employer;
- The agency must confirm whether the temp is to be employed by it under a contract of employment or engaged under a contract for services as this dictates the rights of the employee.

6. EMPLOYMENT STATUS OF AGENCY TEMPS

6.1

Only individuals working under a contract of employment (employees) have the right to claim unfair dismissal. In addition, only employees have the right to receive other benefits such as a statutory redundancy payment, statutory maternity pay and parental leave. Independent contractors working on a self-employed basis under a contract for services do not have these rights.

It will generally be the responsibility of the hiring employer to ensure that an agency worker does not exceed the weekly working time limits and receives appropriate rest periods and rest breaks. However, the agency will normally be responsible for payment of the national minimum wage and ensuring that the temp receives paid annual leave.

6.2

It is also important to note that:

- all aspects relating to poor work performance or misconduct on the temp's part must be passed to the agency for appropriate action
- all disciplinary and grievance issues must be dealt with by the agency
- the agency will be responsible for paying the temp and for agreeing any pay increases;
- the hiring employer may request an alternative temp from the agency at any time and it cannot insist on the supply of a particular worker
- although the temp will inform the Council when they take annual leave the arrangements for booking this leave will be made through the agency
- the temp will report all sickness absences through the agency.

7. CALCULATING THE 12 WEEK QUALIFYING PERIOD

- 7.1 Any period of work (full or part-time) carried out by the agency worker for Wyre Council in a calendar week will make that week count towards the 12-week qualifying period. A calendar week is any period of seven days starting with the first day of an assignment.
- Therefore, even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after 12 calendar weeks calculated in this way.
- 7.2 There is no need for an agency worker to work for 12 continuous weeks in order to reach the qualifying period. Continuity will normally be broken by a break of more than six weeks between assignments in the same job, or when an agency worker takes up a new role with the hirer where the whole or main part of the duties in the new role are substantially different from the whole or main part of the duties in the old role.
- However breaks between assignments due to a number of specified reasons, such as sickness (of up to 28 weeks), jury service or pre-determined closure periods (e.g. school closures during holidays) will not break the qualifying period.
- 7.3 The situation is different in the case of absence related to pregnancy, childbirth or maternity during the "protected period", and for pregnancy, maternity, paternity or adoption leave. In such cases the worker is for the purposes of calculating the 12-week period deemed to continue working in their role for the original intended length of the assignment, or likely duration of the assignment, whichever is longer. The "protected period" starts at the beginning of the pregnancy and ends at the end of the 26th week from childbirth, or when the worker returns to work, if earlier.

8. REQUESTS FOR INFORMATION

- 8.1 After meeting the 12-week qualifying period, an agency worker can make a request in writing to their agency for relevant information about the basic terms and working conditions in the Council. If the agency fails to provide the information within 30 days of the request the agency worker may make the request direct to the Council, who then has 28 days to respond.

If the request is about access to collective facilities and information about employment vacancies, the worker makes the request direct to the Council. The Council then has 28 days to respond.

Where the agency and/or Council fails without reasonable excuse to respond or the response is late, evasive or equivocal, then any employment tribunal can draw an inference from the failure or delay to respond.

9. TRANSFERRING AN AGENCY WORKER TO WYRE COUNCIL

- 9.1 If a temporary worker proves successful, the line manager may wish to consider offering him or her a contract of employment with Wyre Council. There are a number of factors that managers must consider before any offer of employment can be made.

The transfer of an agency worker to the Council's employment will be subject to approval on either a Request to Fill Form or Officer Delegation Form depending on the duration of the vacancy.

Such arrangements usually incur a significant charge that will need to be met by the existing budgetary provision.

- 9.2 **Payment of transfer fees**

Temporary Work Agencies may charge a considerable fee if an agency worker provided by them becomes a permanent employee. They may also insist on a longer hire period before agreeing to waive any temp to permanent fee.

Line Managers are advised to consult with Human Resources / Procurement Officer before entering into any discussion regarding any temp to permanent appointment.

10. ENFORCEMENT OF THE AGENCY WORKER REGULATIONS

- 10.1 An agency worker is able to bring a claim at an employment tribunal to enforce their rights under the Regulations, against the agency and/or the hirer.

Compensation for a breach will be calculated by tribunals on a "just and equitable" basis, with no upper limit on awards. Liability for the award between the agency and the hirer will be determined by the employment tribunal, according to the extent to which it finds the agency and/or the hirer liable for the breach.

It should also be noted that there are, anti-avoidance provisions within the Regulations to prevent assignments being structured to try and avoid creating a 12 week qualifying period. If an employment tribunal finds that attempts have been made to try and avoid the agency worker gaining rights under the Regulations an additional award of up to £5,000 can be made.

11. PRACTICAL STEPS TO AVOID BREACHING THE REGULATIONS

- 11.1 To ensure that the Council is meeting its obligation under the Directive it is essential that a system of reviewing agency arrangements is established.

Managers should ensure that they:

- only engage agency staff in accordance with this procedure;
- maintain accurate records of all periods of employment;
- provide human resources with full details of all agency workers
- notify the agency about the terms and conditions of the staff that they engage;
- notify the agency worker of what terms and conditions they should expect to receive via the temporary work agency.
- ensure that agency workers receive the correct access to staff facilities and information on vacancies and other entitlements.

Line managers as hirers will be required to ensure compliance with the Directive but Human Resources will carry out regular checks.

12. HEALTH AND SAFETY

- 12.1 The health and safety of an agency worker is a shared responsibility but the TWA cannot discharge their legal responsibilities as the employer.

- 12.2 Wyre Council will ensure that agency workers have the same level of health and safety protection as ordinary employees. Managers will notify the TWA of any risks and identify any special qualifications, skills, training or PPE required to carry out the work safely.

The legal responsibility for providing appropriate PPE lies with the TWA but managers will need to ensure that all the items provided are fit for purpose. Where Departments require agency workers to use specified Wyre Council items, then these must be provided free of charge.

- 12.3 All accidents, incidents / near misses must be reported immediately to both the line manager and TWA. Follow up action will be taken in accordance with Wyre Council's Health and Safety Procedures and in consultation with the Health and Safety Advisor.

13. EQUALITY IMPACT ASSESSMENT AND MONITORING

- 13.1 The operation of this policy will be monitored for its impact on different equality groups in line with the Equality Act 2010. This will enable the Council to assess whether any differences have an adverse impact on a particular group, such that further action would be required.

14. DATA PROTECTION

- 14.1 In implementing this policy, the Council will ensure that any personal data relating to the application of this policy will be obtained, processed and destroyed in line with Data Protection requirements.