

The Professional Passport Contractors Guide

The Contractors Guide to The Agency Workers Regulations



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An Introduction to Professional Passport



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Professional Passport started back in 2007 as a direct reaction to the MSC Legislation and the threat of debt transfer.

Working with HMRC to gain a full understanding of how they intended to apply the new legislation allowed us to develop the first provider audit standard of compliance in the market.

It is said that imitation is the best form of flattery and since our ground breaking work in 2007 others have tried to follow, with varying degrees of success. Professional Passport still remains the largest independent standard of compliance across the service provider sector, as well as providing a wide range of additional benefits to all our members through our web portal.

Our audited and approved providers are relied on by thousands of contractors safe in the knowledge that they have passed our stringent assessment criteria.

For over 2 years we worked with HMRC to identify a way of formally confirming the IR35 status of assignments. We are the only organisation that has agreed this process and, now that the Chancellor has confirmed that IR35 is here to stay, we are rolling this back out to our recruitment agency and end client members. This service allows our end clients to provide certainty of status to their contractors.

A year ago now we launched our Network Jobs Site, once again a first in the market. The free to post jobs site was designed and developed as part of our early preparation for the Agency Workers Directive and regularly carries over 7,000 jobs.

Our latest development, Professional Passport Formations, provides an online company formations service for contractors. This new portal allows contractors to form their own limited company electronically and provides possibly the fastest formation service available in the market. If you select business banking through Barclays you can effectively get your company formed for free.

We are continually developing our proposition in line with changes experienced in the market so make sure you keep up to date by registering for our newsletters.

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Introduction

The Agency Workers Regulations [AWR] come in to effect on the 1st October 2011. This guide has been produced to help Contractors, referred to as 'Agency Workers' within the AWR, understand what they mean and what changes they are likely to see as a result.

The guide's primary focus is on the AWR but where appropriate it will bring other relevant pieces of legislation to your attention assisting you to operate in a compliant way.

Guidance is provided to help organisations interpret legislation and understand the intentions behind it. Often there can be conflicts where the legislation leads you to draw one conclusion whereas the guidance may suggest a slightly different scenario; this is common place and the courts will always look to the legislation first, and only refer to the guidance where there is ambiguity in the drafting of the legislation.

Throughout the guide we attempt to highlight these areas of mismatch and suggest the range of options you may be presented with and where these options fit across a range of risk profiles. Where legislation and guidance are aligned this represents the lowest risk. Where legislation and guidance differ there are likely to be a wide range of options emerging and we will attempt to explain these.

As well as providing an explanation and commentary across the key aspects of the legislation and guidance, we have also included what we hope you find to be useful and practical tools to help you through the AWR maze.

It is important you read the full detail to help you understand how you can then use the tools and operate with a risk profile aligned to your position.

This guide provides information on the following topics:

- The AWR
- The Traditional Umbrella Model
- The Swedish Derogation Umbrella
- The Limited Company Contractor
- Other Relevant Legislation

You may also find it useful to refer to our **Guide to IR35** and our **Guide to Operating Structures** for further information.

Disclaimer Statement

The content of this guide is for guidance only and is not designed to replace your professional advisers or replace the need for professional advice. Whilst every care has been taken to ensure its accuracy this is a new and complex area that will only become clear as the courts make their rulings. In all cases you should seek your own legal and professional advice for your own situation.

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Overview of AWR

The Agency Workers Directive made its first appearance in 2000 under the Greek EU Presidency. For the next 7 years many attempts were made to re-introduce the Bill without success.

In 2008, with the support of the Labour Party and a deal agreed between the TUC and CBI, the Bill was finally passed and the Agency Workers Directive became European Law.

Under the agreement the UK was now in a position where they had to adopt the law and put the required legislation in place, coming into effect on 1st October 2011; all EU Countries must implement their own version of the rules by no later than 5th December 2011.

In 2009 the Government entered into a series of consultations on the proposed regulations with the final Regulations being published in January 2010.

In the run up to the General Election in May 2010 the Conservative Party made it clear that they believed Labour had gone way beyond the requirements of the Directive and had "gold plated" the Regulations. They promised to undo this if they came to power.

The Conservatives did come to power, all be it as the major party in a coalition, and then realised they were powerless to make any amendments to the

Regulations.

Any attempts to amend the Regulations would require the agreement of both the TUC and CBI. The Government were reluctant to reopen negotiations as important concessions gained, such as the 12 week qualifying period, could be lost resulting in even greater issues and complexity.

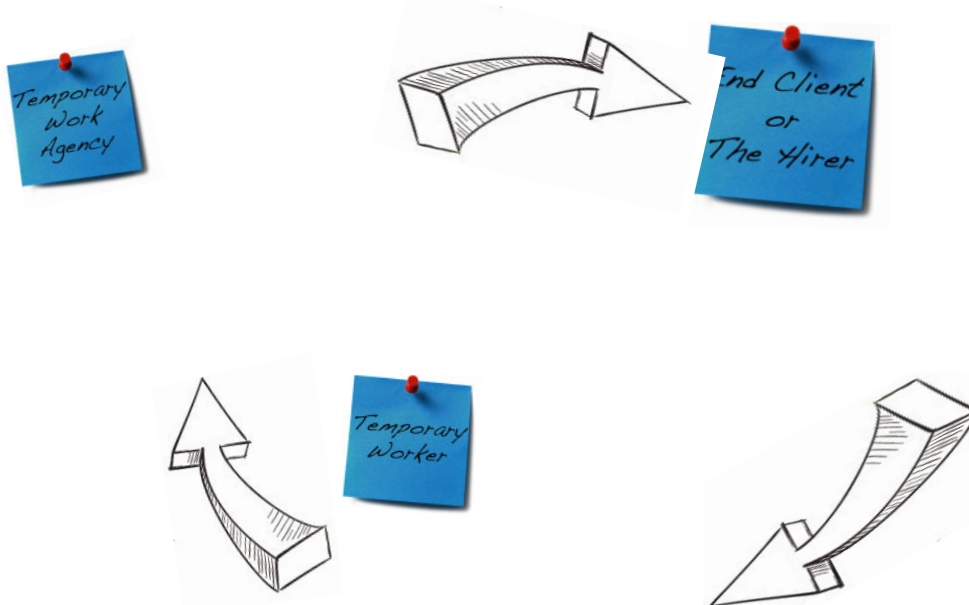
As a result the Government announced that they would use the guidance to clarify the Regulations and attempt to address, and answer, the many issues that had been raised.

This approach has resulted in the position we find ourselves in today with guidance that is attempting to address some of the short comings of the Regulations and, in some cases, presenting a different interpretation than the Regulations themselves.

Contractors are quite used to this situation as they have been facing exactly the same scenario with IR35 Legislation for over 10 years.

The principles of the Regulations are straight forward and where openness and transparency exist they should not represent too great a challenge; things become a little more complicated where this is not the case.

"The unique, tripartite relationship between agency worker, agency and hirer is a key feature of these Regulations and who is covered by them."



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We have provided this high level summary for your convenience; there is a lot of detail behind this and we would advise that you read the relevant sections of the guide to gain a complete understanding.

Umbrella Contractors

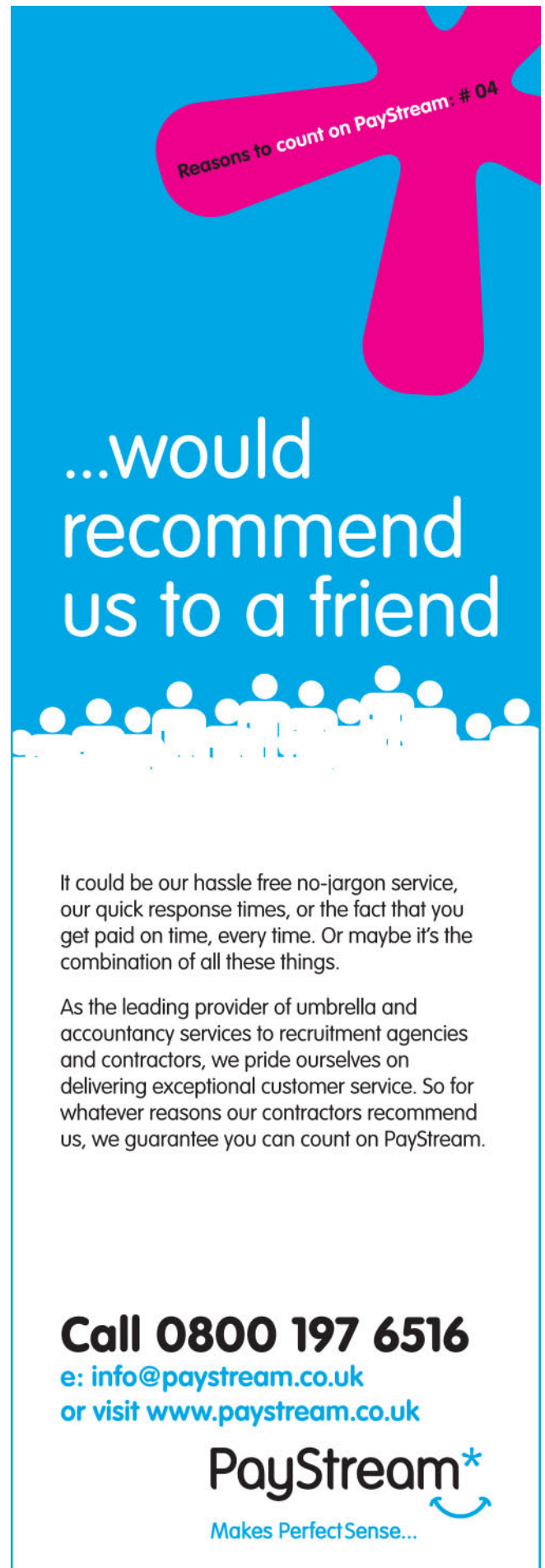
- In the majority of cases umbrella contractors will be considered 'in scope' of the Agency Workers Regulations.
- You may have to change umbrella provider as many recruitment companies will move to a restricted preferred supplier list; check with your recruitment company before signing up with a provider.
- If equal pay cannot be demonstrated you will be offered compensation to give up your right to equal pay.
- If equal pay is not achieved you will have to operate through an umbrella known as a Swedish Derogation Umbrella; this is similar to a traditional umbrella except it pays you compensation for giving up your rights to equal pay.
- If you don't like the compensation offered either negotiate a better rate or walk away.
- In the case of a dispute it is the contractor that has to bring the case, usually within 3 months of the end of the assignment or when they became aware of an issue.
- You should raise any issue directly with your umbrella provider, or recruitment company, to try and resolve it before proceeding to an employment tribunal.
- Where you have agreed terms at outset and these were accurate, open and transparent you are unlikely to bring any successful claims.
- You will find that some assignments are not available to umbrella contractors as end clients can, and will, instruct their recruitment partners that they only want to engage with contractors who operate through their own limited company.

Executive Summary

Limited Company Contractors

- There is no formal link between AWR and IR35 although if you are 'in scope' of AWR then you will be inside IR35.
- You are likely to be asked to confirm whether you operate 'in business on your own account.'
- If you confirm that you are in business on your own account, and the client does not supervise or direct you, then you will be out of scope of the AWR.
- Out of scope contractors are likely to be provided with IR35 neutral contracts to allow them to assess the actual status based on the arrangements between themselves and the client.
- In scope contractors, those not in business on their own account or under the supervision and direction of the end client, will be provided with separate contracts where the terms are likely to fail any IR35 tests.
- In scope contractors will be caught by IR35 and recruitment companies may ask for an accountant's confirmation that the deemed payment calculation is being applied to the income from that assignment.
- In the case of a dispute it is the contractor that has to bring the case, usually within 3 months of the end of the assignment or when they became aware of an issue. You should also consider the potential impact on your tax status.
- Where you have confirmed, at outset, that the relationship is based on you being in business on your own account you are unlikely to bring any successful claims.

You will also find further information and links at the end of our Glossary of Terms section towards the end of the guide.

A vertical advertisement for PayStream. At the top, a pink starburst shape contains the text 'Reasons to count on PayStream: # 04'. Below this, the main headline reads '...would recommend us to a friend' in large white font against a blue background. Underneath the headline is a row of white silhouettes of people. The bottom half of the ad is white and contains text about the service's benefits and contact information. The PayStream logo is at the bottom right, featuring a blue smiley face.

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Who is covered by The Regulations

The intentions of the Regulations are quite straight forward:

"To provide agency workers the entitlement to the same or no less favourable treatment with respect to basic employment and working conditions, if and when they complete a 12 week qualifying period."

In most cases we believe it will be clear where the Regulations apply although there are a number of grey areas and these will be left for the courts to decide.

Exclusions to be aware of:

- Workers operating through their own limited company that are **also** in business on their own account and not under the supervision or direction of the end client. [We cover this aspect later in the guide.]
- Directly recruited workers

What does this mean in practice?

There are two key stages;

- Day 1 rights for all agency workers
- Equal treatment after 12 weeks

Day 1 Rights

All Agency Workers [contractors to you and I] from 1st October 2011 will be entitled to access the same facilities and information on job vacancies as comparable permanent employees.

Some of the examples given are: staff canteen, car parking and child care facilities.

What changes are contractors likely to see?

- Where you fall within the scope of the Agency Workers Regulations you will also be caught by IR35.
- Recruitment agencies are likely to move to restricted preferred supplier lists for umbrella providers that could mean contractors have to operate through one of the selected umbrella providers.
- Contractors operating through their own limited company will have to confirm their status.

Agency Worker



Umbrella Company



Agency



Master or Neutral Vendor



End Client or The Hirer

"an individual who has a contract with a Temporary Work Agency but works temporarily for and under the direction and supervision of a hirer."

"an individual working through an umbrella company, who finds work via a TWA, is covered by the Regulations."

"a temporary work agency supplies agency workers to work temporarily for a third party."

"fall within the definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments."

"The hirer is a private limited company [partnership or sole trader] or public sector body that books agency workers through a temporary work agency."

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Equal Treatment After 12 Weeks

Equal treatment after 12 weeks

After 12 weeks in the same job/role then the Agency Worker acquires additional equal treatment rights such as:

- Pay and bonuses
- Duration of working time
- Annual Leave

“the requirement is simply to treat the worker as if he or she had been recruited directly to do the same job.”

What is comparable pay?

The guidance makes it clear that comparable pay does not have to be a direct comparison made to a worker and can actually be reference to the pay scales and contractual entitlements for permanent workers within a company.

Will all companies match pay and entitlements?

The Regulations require companies to provide ‘comparable pay’ but they do recognise that in a small number of cases this may not be possible.

The definition of equal pay includes more than just a comparison of salary and extends to include bonus entitlements as well as any additional holiday entitlements over and above the statutory minimum. These additional tests will mean that in some cases hirers are not able to provide confirmation that comparable pay has been achieved.

Where a hirer is unable to offer, or confirm, comparable pay then the Regulations contain a concession known as The Swedish Derogation.

The Swedish Derogation is explained in detail later but does allow a hirer to engage contractors without demonstrating equal pay provided certain conditions are met.

Disputes over pay and compliance

Contractors will have to raise any issues or concerns as soon as they arise, as typically a case must be brought within 3 months of becoming aware of the issue, or 3 months from the end of the contract or assignment.

Any claims of non compliance to the Regulations will be heard by the Employment Tribunals.

Both the BIS guidance and the guidance on the Employment Tribunals website make it clear that in all cases the parties should try and resolve any disputes without bringing a case to the Tribunal.

The minimum award will generally be equal to two weeks pay, with no maximum.

The Tribunal also has the ability to award penalties up to a maximum of £5,000. The BIS guidance outlines examples where penalties will apply and these predominately relate to where there is evidence of **anti avoidance tactics** or **intentional** abuse.



Whenever a dispute arises attempts should be made to resolve without the need for further action or a claim being made to the Tribunals Office.

Typically the contractor has 3 months to make their claim. If accepted all parties will be asked to formally respond. If no response is made the Tribunal is likely to make a Default Judgement.

In the majority of cases the minimum award is two weeks pay; there is no maximum.

Penalties of up to £5,000 can also be imposed.



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What Options Will Be Available?

Following the implementation of AWR there are likely to be five main options available to contractors;

- Agency PAYE, available today but typically only used by contractors on low rates
- The Traditional Umbrella, as we have today
- The Swedish Derogation Umbrella, used where comparable pay cannot be demonstrated
- Own limited company within the scope of the Agency Workers Regulations
- Own limited company out of scope of the Agency Workers Regulations

We will now look at each of these in more detail.

Agency PAYE

Recruitment companies that deal with lower paid workers tend to still offer this option to their contractors although there has been a move in recent times towards umbrella companies.

If you are paid a low rate and have low expenses then this could be a route to investigate.

The recruitment company will offer a different rate for the assignment if you work through their payroll; the rate will be lower than the rate offered if you work through an umbrella, as the recruitment company has to account for expenses such as employers National Insurance, holiday pay and statutory benefits.

Traditional models do not allow workers to claim expenses when using an agency payroll.

Your overall return, ie. the amount you get in your pocket, should be similar to the returns from an umbrella.

Contractors on rates over £10 per hour with regular expenses to claim are likely to benefit from using an umbrella.

Umbrella Companies - General

There are some key points you should be aware of in the operation of umbrella companies:

• 'In Scope'

Contractors operating through umbrella companies are likely to be caught by the Regulations, as they are typically under the supervision and direction of the hirer; this is known as 'in scope'.

• National Minimum Wage Compliance

All umbrella companies must comply with the National Minimum Wage rules.

This will mean that contractors on lower rates will be unable to work through an Umbrella as the umbrella would not be able to apply a compliant pay calculation and still meet NMW.

The minimum rate that allows a worker to operate through an umbrella is dependant on the umbrella margin.

Contractors on rates on or around the minimum rate will be unable to claim expenses and therefore have no tax savings to offset the umbrella provider's margin.

• Claiming Expenses

One of the main selling points for umbrella companies is that their workers are able to claim a range of expenses that are not generally available to permanent employees or workers operating through traditional agency payroll models.

In order for a worker to claim expenses for travel and subsistence from their umbrella company there are a number of critical steps that must be achieved for example;

- The umbrella must operate with an overarching employment contract

continued >

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What Options Will Be Available?

< continued

- The contractor must confirm their intention to carry out multiple assignments whilst employed by the umbrella
- The contractor cannot be based, or have an expectation to be based, at a site for over 24 months

Workers who are unable to meet all the requirements will be prevented from making any travel and subsistence expense claims.

Some examples where contractors will be unable to claim any travel and subsistence expenses on an assignment from outset are:

- A temp to perm assignment
- Where you have no intention of carrying out multiple assignments and are using the assignment to fill a gap before

starting a new job

- Where the contract is over 24 months from outset

Contractors are also be prevented from claiming expenses during their notice period with the umbrella as under HMRC rules the final workplace automatically becomes classed as a permanent workplace; travel and subsistence expenses are not allowed to a permanent place of work.

The Traditional Umbrella

The Traditional Umbrella model is the model that exists on the market today. It continues to work well post AWR where the contractor is receiving equal treatment aligned to the terms of the Regulations.

Contractors should be aware that 'pay', for the purposes of The Agency Workers Regulations, includes basic salary, assignment bonuses and expenses paid by the umbrella. We have provided an example payslip for you to demonstrate this.

Company						A Traditional Umbrella Provider		Typical Pay Advice	
Payments				Deductions					
Description	Hours	Rate	Amount	Description	Amount	Description	Amount		
Salary	144	£5.93	£853.92	Income Tax	£ 137.82	Earnings for NI	£1312.37		
Bonus			£312.51	National Insurance	£ 85.24	Gross for Tax	£1312.37		
Holiday Pay			£145.94	Total Deductions	£ 223.06	Total Gross Pay	£1312.37		
Expenses			£200.00						
						Year to Date			
						Taxable Gross Pay	£1312.37		
						Income Tax	£ 137.82		
						Employee NIC	£ 85.24		
						Employer NIC	£ 115.78		
						Expenses	£ 200.00		
Wk./Mth.	Date	Dept.	P/Method	Tax Code	Employee No.	Employee Name		Net Pay	
1	First Day	Finance	Monthly	747L	36302	Fred Smith		£1,289.31	

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What Options Will Be Available?

The Swedish Derogation Umbrella

This is the new version of an umbrella model implemented as a direct result of the AWR. The model is designed to work where comparable pay cannot be demonstrated.

As the requirement to compare pay has been removed, the Regulations contain additional requirements and safeguards to prevent abuse.

The Swedish Derogation model is not a light touch umbrella; all the processes required to keep the Traditional Umbrella compliant are also required within the Swedish Derogation model including;

- Overarching employment contracts
- National Minimum Wage compliance
- Rules on expenses

There are also some additional obligations that have to be met, including;

- Gaining a contractor's confirmation that they are happy to be removed from the pay comparison requirements and the compensation offered for giving up this right; this has to be agreed before the assignment commences
- Contractors must be paid between assignments as their compensation for giving up their right to equal pay.

Pay Between Assignments - What does this mean in reality?

The intentions seem quite straight forward; after the initial qualifying period, [12 weeks], has been passed, you will be entitled to additional pay if you find yourself out of work at the end of the assignment.

Whilst the Regulations state that you must be paid when you are between assignments as compensation for giving up your equal pay rights, and that this has to be agreed before you commence the assignment, there is significant ambiguity around the levels of compensation that should be offered; ultimately it will be up to the courts to decide what they deem as compliant.

What is considered acceptable is also likely to be driven by market forces as it is the contractors that have to accept any offer of compensation. Whilst refusal of an offer may result in the loss of the assignment if you feel the terms offered are not fair then do not accept the offer.

It is the contractor that has to raise any dispute. Before taking a dispute to an Employment Tribunal the contractor will first need to raise this first with their employer, the umbrella. If the terms agreed at outset were clearly stated it will be difficult to bring a successful claim.

To prevent abuse you too have to meet certain criteria:

- **You must be available for work**

This is likely to be more than just saying you are available. Some umbrellas may require you to attend their offices and in all cases you are likely to have to demonstrate that you are actively seeking work.

If you fail to meet your obligations, and these will be set out clearly in the contract of employment, then you will fail to qualify for your pay between assignment compensation.

- **You must accept suitable work**

When you commence your engagement with a Swedish Derogation Umbrella you will agree the parameters of suitable work. This is likely to reflect the key terms of your initial assignment and include aspects such as hours, geographical location, type of work etc.

When an assignment ends you may be offered work that falls within the parameters of being 'suitable'; if you refuse this work you are unlikely to receive any pay between assignment payments.

You may also find that some umbrellas also retain the right to end your contract under these circumstances without paying you pay between assignment compensation.

- **You lose your entitlement to compensation if you resign**

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What Options Will Be Available?

The Limited Company Contractor

A limited company contractor can be either 'in scope' or 'out of scope' depending on their business status.

Contrary to many of the earlier publications, contractors who operate through their own limited companies are not automatically out of scope.

Determining 'In Scope' or 'Out of Scope'

The guidance is [intentionally] vague in providing clear direction for determining whether an assignment taken by a contractor operating through their own limited company would be in or out of scope.

It now avoids referring directly to IR35; the reference to HMRC's Employment Status Indicator tool has been removed and is now replaced with a link to Directgov.

There are however a number of points that are clear:

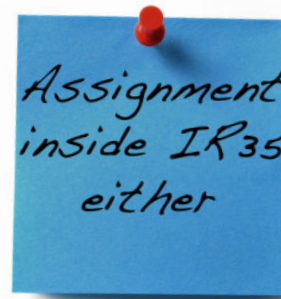
- A contractor operating through their own limited company on an assignment that is outside IR35 is likely to be considered outside the scope of the AWR.
- Contractors on assignments that are inside IR35 are not necessarily caught by AWR.
- It is the contractor that has to bring a case where a dispute arises and they must consider the impact on their tax status.

It is this last point that is likely to determine the approach taken to assessing the status for contractors who operate through their own limited company.

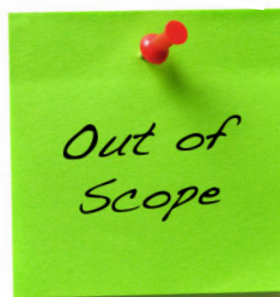
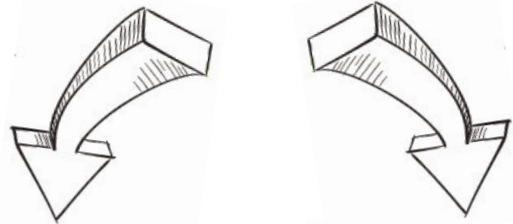
Contractors who operate through their own limited company are entirely responsible for assessing the IR35 status of their assignments and, depending on the outcome, applying the appropriate tax regime.

Where a contractor assesses an assignment as outside of IR35 they must also be outside of the scope of The Agency Workers Regulations.

Where a contractor assesses their status as within IR35 they could still technically be outside the scope of the AWR although in these case most are likely to be considered within the scope of the Regulations.



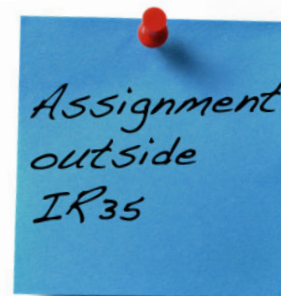
Assignment
inside IR35
either



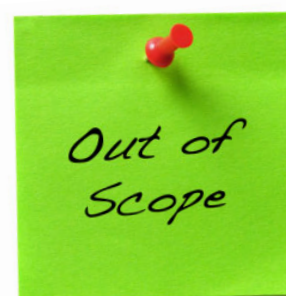
Out of
Scope



In Scope



Assignment
outside
IR35



Out of
Scope

What Options Will Be Available?

As it is the contractor's responsibility to determine their own IR35 status, and they hold all the consequences for a wrong assessment, recruitment companies are likely to ask contractors to confirm their status in relation to the Regulations.

Recruitment companies are likely to have two versions of contract available for contractors who operate through their own limited company;

- **IR35 Neutral**

This is the version of contract that would be provided to all contractors who operate through their own limited company and confirm that they are **'out of scope'** of The Agency Workers Regulations.

As the name suggests it is a contract where the key terms would be considered neutral in terms of IR35. The actual status would be established by an examination of the actual working relationship that exists between the contractor and end client.

If the contractor then went on to decide that the assignment was outside of IR35 they could remunerate themselves through a mix of salary and dividends.

- **IR35 Fail**

This is the version of the contract that would be provided to all contractors who operate through their own limited company and confirm that they are **'in scope'** of The Agency Workers Regulations.

As this contract would place an assignment within IR35 the contractor is limited to taking all the income from this assignment after applying the Deemed Payment Calculation; this prevents the payment of dividends and taxes the income fully under the PAYE regime. This is the least favourable tax position for contractors.

continued >

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What Options Will Be Available?

In some cases the recruitment company may ask the contractor, or their professional adviser/accountant, to confirm that the deemed payment calculation is being applied.

The most appropriate operating structure for a contractor should be determined by a review of their individual circumstances, objectives and intentions. We have produced a Beginners Guide to Operating Structures that will provide further information to help you decide what could be the most appropriate structure for you.

MSC Legislation and Debt Transfer

MSC legislation came into effect in 2007 and, in simple terms, it was designed to ensure that contractors who operate through their own limited company have to take responsibility for the

company, preventing specialist providers from offering the same levels of support they did previously.

Where the support fails, the contractor will be subject to additional tax liabilities as effectively all the income received has to have full PAYE tax and National Insurance applied.

The legislation also allows HMRC to transfer a company debt to the individual which means that there is no way to escape it, once assessed.

Professional Passport helps contractors in this area; we have a range of accountancy service providers that have been audited and approved against the requirements of the MSC legislation.

Many recruitment companies will point contractors to our listings as they, too, see this as the safest route for selecting a compliant provider.



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Umbrella Contractors Questions and Answers

Can I still use my umbrella company after 1st October 2011?

Possibly

If the assignment is confirmed as comparable pay then you will be able to use a traditional umbrella.

Many recruitment companies are looking to work with a restricted number of umbrella companies, as this makes their compliance checks and administration easier, so if your umbrella company is not on the list then the recruitment company may require you to move to one of their selected providers.

If the assignment is offered under The Swedish Derogation it is even more likely you will have to operate through an agency specified provider. The recruitment companies will be working closely with their selected providers to agree how the Swedish Derogation should operate.

How will I know if my assignment is based on equal pay or Swedish Derogation?

Your recruitment company should inform you when you first enquire about a role.



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Umbrella Contractors Questions and Answers

My recruitment company has confirmed that my assignment will operate under the Swedish Derogation; what compensation should I get for giving up my equal pay rights?

You are going to find a wide variety of options provided to you depending on your sector, recruitment company, end client and umbrella provider.

Some companies have decided to only offer Swedish Derogation contracts and could offer an all inclusive rate which also includes your compensation, known as pay between assignment. This could be paid to you in advance and could be in the form of loans.

As the regulations are new and untested there is no clear definition of what is compliant; over time this will change. The simple fact is that as long as it is made clear to you, at outset, what the arrangements are and what you can expect then if you find these acceptable take up the position.

If you are happy with the offer, and take it. If you don't like the terms of the arrangement then don't agree to them; walk away and find another assignment.

Can I refuse to accept the terms if I don't think they are fair?

Yes.

If you are not happy with the terms you do not have to accept them. You could try to negotiate them; failing that you will have to walk away from the assignment.

When must I agree the terms of employment and compensation with my Swedish Derogation umbrella?

Before you start the assignment.

I work through a Swedish Derogation Umbrella and I am now between assignments but not being paid is that correct?

This will depend on a number of factors:

- You must review the terms you agreed at outset; some providers pay you the pay between assignment compensation as an advance whilst you are on assignment.
- You may have conditions in your contract of employment that must be met by you to demonstrate that you are available for work and therefore qualify for the pay between assignment compensation.
- If you have been asked to apply for jobs and have not done so that too could be a condition of your compensation, so long as the jobs were in line with the description of suitable work in your contract.

In all cases if you have doubts we suggest you raise these directly with your umbrella provider.

Umbrella Contractors Questions and Answers

I have been told that an assignment I am going for is only available to contractors who operate through their own limited company can this be correct?

Yes

One of the potential consequences of The Agency Workers Regulations is that some end clients will instruct their recruitment partners that they now only want to engage with contractors who operate through their own limited company.

Where a contractor operates through their own limited company and confirms they are in business on their own account, so long as the end client does not supervise or direct them they can be considered as outside the scope of the Regulations. This makes them easier to deal with from both a risk and administration perspective.

It is widely accepted that assignments that are either inside or outside IR35 can still be outside the scope of The Agency Workers Regulations, whereas assignments that are in scope of The Agency Workers Regulations must also be caught by IR35.

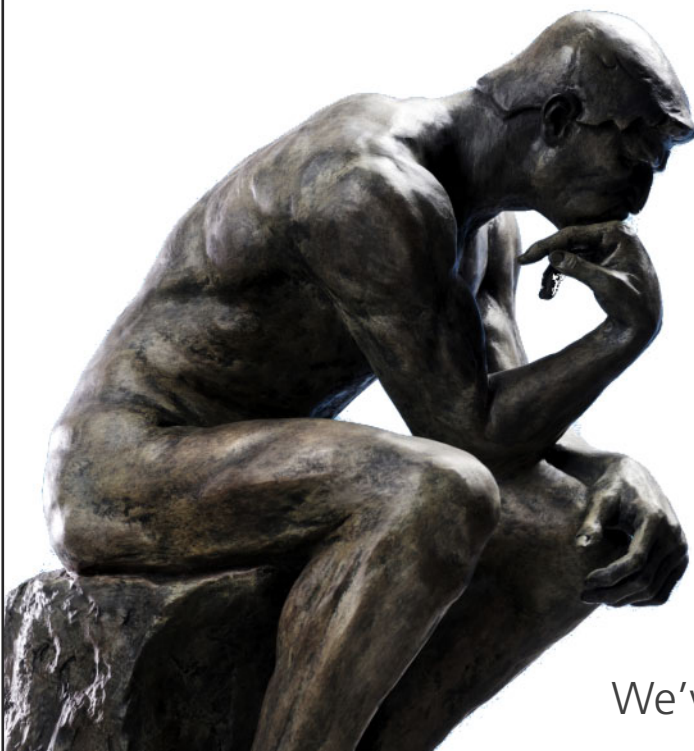
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Umbrella Contractors Questions and Answers

My recruitment company has confirmed that the assignment is on comparable pay; will I need to do anything?

Possibly

Where an assignment is offered as comparable pay you will be able to operate through a Traditional Umbrella; the type of umbrella that has been about for quite a while and probably the type you are currently with.

The reason that the answer is possibly is that many recruitment companies are moving to restricted preferred provider lists, in order to ease their compliance burden, if your umbrella is not on their list then you may be asked to change.

It will be worth checking with your recruitment company, at outset, which providers they accept. You will find that the majority of recruitment companies will accept providers that have been audited and approved by Professional Passport.

If I have a dispute how do I take it forward?

In all cases if you have any issues you should first raise these with your umbrella provider and recruitment company. You should make attempts to resolve any dispute before progressing the case to an employment tribunal.

If you are working through a Swedish Derogation Umbrella and the terms you agreed at outset were clear and transparent you could have difficulty in bringing a successful claim.

If your assignment was on comparable pay and therefore you are using a Traditional Umbrella, if you become aware of something that makes you question whether comparable pay is being achieved you should immediately raise this with your umbrella provider and recruitment company.

Remember comparable pay can be measured using pay scales in force within a company and not just to a direct worker.

The obligation to provide comparable pay only starts after 12 weeks in the assignment, not from outset.

you may find that higher value assignments are...

... restricted to contractors with their own company

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Limited Company Contractors Questions and Answers

I am being asked to confirm that I consider myself as 'in business on my own account' why am I being asked that?

As a limited company contractor you could be outside the scope of The Agency Workers Regulations where you are in business on your own account and not under the supervision and direction of the end client.

Does being outside the scope of The Agency Workers Regulations also mean that I am outside IR35?

No

All links between The Agency Workers Regulation and IR35 have been [deliberately] removed.

To be out of scope of the AWR as a limited company contractor you must be 'in business on your own account' and not under the supervision and direction of the end client. It has no relation to IR35.

If you are within the scope of the AWR you will find that, as a result, you are also likely to be inside IR35. Many of the benefits provided to you as an agency worker in scope of AWR are clear indicators of being inside IR35.

If I am inside the scope of The Agency Workers Regulations what will that mean to my IR35 status?

If you are within the scope of the AWR you will find that, as a result, you are also likely to be inside IR35.

Many of the benefits provided to you as an agency worker in scope of AWR are clear indicators of being inside IR35.

You can be out of the scope of AWR regardless of whether your assignment is inside or outside IR35 but if you are in scope of the AWR then you are likely to be caught by IR35.

Will my agency confirm my IR35 status as well as my AWR status?

No

As we have highlighted above there is no link between IR35 and AWR.

As a limited company contractor it is you that is likely to have to confirm your AWR status to the agency, unless the assignment is clearly under the supervision and direction of the end client in which case you will automatically be in scope for AWR, and as a direct result you are also likely to be caught by IR35

Contractors retain responsibility for assessing their own IR35 status; nothing changes there.

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Limited Company Contractors Questions and Answers

I am being told that I will be provided different terms of engagement depending on my AWR status is this correct?

Yes

Where a limited company contractor confirms that they are in business on their own account and not under the supervision and direction of the client they are likely to be offered contractual terms that are IR35 neutral.

This will allow you, the contractor, to assess your true IR35 status based on the actual working relationship between you and your end client.

Where you do not confirm that you consider yourself to be in business on your own account or the assignment is under the supervision and direction of the end client then you will be in scope of AWR.

The contractual terms offered in these situations are likely to be more representative of an assignment that is caught by IR35 and as we have already highlighted, if you are in scope AWR you are likely to be considered as caught by IR35.

I have worked for an end client for quite a while and considered myself as outside IR35; I am now told that the assignment is in scope of the AWR what do I do?

As we have already stated there is no direct correlation between AWR and IR35 except where a worker is in scope AWR and therefore is likely to be considered as inside IR35.

From this point forward we would advise you to review your position and apply the deemed payment calculation to all future income from this assignment.

You could attempt to renegotiate terms with your recruitment company as a result of the additional tax you will now suffer.

You can of course always find a different assignment that is out of scope AWR and outside IR35.

How you deal with the past will depend on a number of factors and we would strongly recommend that you seek professional advice and guidance on your situation.

in business on your own account and not supervised...

... or directed by the client equals outside AWR

Limited Company Contractors Questions and Answers

If I have a dispute in relation to AWR how do I take it forward?

This will only apply to limited contractors who are in scope of AWR; if you have confirmed that you are in business on your own account and not under the supervision and direction of the end client you are outside the Regulations and therefore cannot have a dispute with any part of them.

Where the Regulations apply to you, in all cases if you have any issues you should first raise these with your recruitment company. You should make attempts to resolve any dispute before progressing the case to an employment tribunal.

where equal treatment within the AWR applies...

... a contractor is likely to fail IR35

Glossary of Terms

Access to Facilities

Providing agency workers with the same access rights to certain facilities as permanent staff. Examples given are staff canteen, transport facilities, car parking and child-care.

Access to Vacancies

Agency Workers now have the right to be notified of any job vacancy that becomes available at the end client. This is from Day 1.

Agency Worker

The term used to identify the workers that are subject to the new legislation. Defined in the guidance as:

An agency worker (often referred to as a 'temp') is someone who has a contract with the TWA (an employment contract or an agreement to provide services personally) but works temporarily for and under the direction and supervision of a hirer. The unique, tripartite relationship between agency worker, agency and hirer is a key feature of these Regulations and who is covered by them.

The key elements required for someone to be an agency worker are:

- *There is a contract (an employment contract or an agreement to provide services personally) between the worker and a TWA;*
- *That worker is temporarily supplied to a hirer by the TWA; and*
- *When working on assignment the worker is subject to the supervision and direction of that hirer.*

AND

- *The individual in question is not in a business on their own account.*

Annual Pay Award

The term used to identify annual pay increments offered by end clients to their permanent staff.

Where these awards are made an agency worker should receive the same pay increment that they would have been entitled to if they were recruited directly to do the same job.

Anti Avoidance

Measures that have been put in place to avoid any party circumventing the Regulations.

Audit Trail

Having demonstrable evidence to show that the required information was requested.

AWD and AWR

The Agency Worker Regulations; previously referred to as AWD before the Regulations came in to effect. AWD is the Agency Workers Directive and refers to the European Directive that was passed by the European Parliament in late 2008. It was this Directive that requires the UK to implement the Regulations by no later than December 2011.

BIS

The Department for Business, Innovation and Skills. A Government Department that many people still refer to as its very old name The DTI.

Break between Assignments

The term used to describe a gap in a contract. This could be to describe a period where a worker is not engaged on any assignment but could still be engaged by an umbrella company, or where a worker has previously worked for an end client and is returning after a break.

Bonuses

In relation to AWR; an amount that is directly attributable to the amount or quality of the work done by the individual and included when having to compare pay.

Umbrella Providers can also use the term bonus [or assignment bonus or commission] to describe the element of a worker's pay that is paid in addition to basic salary.

beware - not all companies that call themselves ...

... umbrellas meet HMRC's definition

Glossary of Terms

Collective Facilities

The description used to define the facilities that are included in the equal treatment from Day 1. Some of the examples given are: canteen, creche and car parking.

Comparable Pay

Equal pay comparisons can be with a direct employee who is doing broadly the same role or, what is more likely, the use of pay scale rates for a role. The BIS Guidance provides some excellent examples on the use of pay scales for comparable pay.

Comparable Worker

An employee or worker engaged directly by the end client. This worker can be used as a benchmark for equal treatment for an agency worker who is doing broadly similar work.

Comparator

The employee or worker engaged directly by the end client who is the basis of comparison for equal treatment covering both Day 1 Rights and rights acquired after the 12 week qualifying period.

Day 1 Rights

The rights that must be given to all agency workers from the first day of their engagement. These include: access to information on vacancies, collective facilities or amenities.

Direct Engagement

Where the end client contracts a temporary worker without the use of a recruitment company or agency.

Employees NI

Employees National Insurance is a tax paid by employees on their taxable pay under the Pay as Your Earn rules [PAYE].

Employers NI

Employers National Insurance is a tax paid by employers on their employees gross taxable pay under the Pay as Your Earn rules [PAYE].

In the case of an offshore umbrella this tax is not covered under the double taxation agreements that exist and is often not paid by offshore umbrellas. Where they fail to pay this to HMRC it can leave end

clients exposed to the risk of investigation and challenge by HMRC and, where successful, allow HMRC to transfer any outstanding liabilities directly to the end client as the 'host employer'.

Employment Tribunals

The formal process that will hear, and rule on, disputes where a worker feels the terms of the AWR have not been met.

Typically claims made by workers must be received by the tribunal within 3 months of when the alleged breach occurred or the end of the contract.

End Client

Also referred to as the hirer and is the ultimate client where the temporary worker is working.

Equal Treatment

The term used to describe how an agency worker must be treated in relation to a direct employee doing broadly the same role.

ESI

The Employment Status Indicator tool developed by HMRC to determine a worker's employment status.

Hirer

Also referred to as the end client and is the ultimate client where the temporary worker is working.

Holiday Pay

Payments made to workers when they are on holiday; one of the measures within the equal treatment.

Where the holiday entitlement is above the statutory minimum this additional amount can be either given as paid leave or paid in lieu as part of the rate.

In Business On Your Own Account

The phrase used to define a contractor who operates through their own limited company and is outside the scope of the AWR.

The phrase relates to a series of tests, that are not defined in the Regulations, that should be applied to establish the worker's status.

continued >

Glossary of Terms

< continued

Workers who are outside IR35 are likely to be considered out of scope, however workers inside IR35 could be either in scope or out of scope depending on the exact terms of their assignment.

In-House Temporary Staffing Bank

Generally considered out of scope where a company employs its temporary workers directly and they are only supplied to work directly for that business [although they are still subject to the Fixed Term Employees (prevention of less favourable terms) Regulations that have been in place since 2002.]

In Scope

The term used to refer to an agency worker who is within the Agency Workers Regulations.

Information Requests

The information that a temporary work agency should ask for / receive from the end client for each vacancy.

The ability for an agency worker to request information in relation to their equal treatment entitlements.

IR35

A piece of legislation that applies to all contractors carrying out assignments through their own limited company.

It is designed to identify and differentiate between disguised employees and contractors who are in business on their own account by applying a series of prescribed tests to determine their status.

The outcome of the tests determines how the income from a specific assignment will be taxed.

Liability

The potential consequences for failing to meet the requirements of the legislation.

The minimum award, in the majority of cases, is the equivalent of two weeks money with no maximum.

Penalties can also be made of up to £5,000.

Managed Service Contracts

Where a company provides a specific service to a client; the examples used are catering and cleaning.

Where the contract is for a contract for services and sets out service level agreements these are outside the scope of the AWR.

Master Vendor

Where one company, usually a recruitment company, is appointed to manage the supply of workers to an end client.

These master vendors typically use other recruitment companies to provide workers as required.

A master vendor falls within the definition of a Temporary Work Agency and therefore is in scope.

Multiple Hirers

Where an agency worker is engaged on multiple assignments through a number of recruitment companies.

National Minimum Wage

The legal minimum wage a worker can be paid per hour.

At the time of going to press this was:

- £5.93 for workers aged 21 and over
- £4.92 for workers aged 18 - 20
- £3.64 for workers aged 16 -17
- £2.50 the apprentices rate

The rates change in October and the new rates applicable from 1st October 2011 are:

continued >

workers who are outside IR35 are likely ...

...to be considered out of scope for AWR

< continued

- £6.08 for workers aged 21 and over
- £4.98 for workers aged 18 - 20
- £3.68 for workers aged 16 -17
- £2.60 the apprentices rate

Neutral Vendor

Similar to a Master Vendor but usually the company has no direct recruitment offering of its own.

These neutral vendors typically use other recruitment companies to provide workers as required.

A neutral vendor falls within the definition of a Temporary Work Agency and therefore is in scope.

New Hirer

A new hirer for the purposes of the AWR must be a different person, or a different legal entity.

Where a hirer has multiple sites, moving the worker to another is unlikely to constitute a new hire.

Where a hirer is part of a larger group, and each company has its own legal identity, then each company will be a new hirer, subject to the anti avoidance rules.

Out of Scope

Where a worker is outside the rules and the Regulations do not apply.

Overarching Employment

The terms and conditions of employment used by umbrella providers that allow workplaces to be assessed as a series of temporary workplaces.

Where a workplace is assessed as temporary then travel and subsistence expenses can be claimed.

Pay

Pay is one of the measures of equal treatment under the Regulations and is tested after a 12 week qualifying period.

Pay Between Assignments

Where a worker sacrifices their right to equal pay there is a requirement to pay the worker a prescribed amount when they are in between assignments.

The worker must have qualified by completing the 12 week qualifying period.

PAYE

The UK tax regime to tax employed workers on their employed schedule E income.

Pay as you Earn includes both Tax and National Insurance Contributions.

Payment in Lieu

Where holiday entitlement is above the statutory minimum then this additional entitlement can be paid as part of the hourly or daily rate.

It can also be paid as a one off payment at the end of the assignment.

Penalties

An additional amount that an Employment Tribunal can levy where they feel it is appropriate.

Penalties can be up to a maximum of £5,000.

They are only likely to be applied in extreme situations or where there are clear and deliberate breaches of the rules.

They can be applied to any of the connected parties in the chain.

Permanent Contract of Employment

Where a worker agrees to sacrifice their right to equal pay under the Regulations they must be offered full employment, either through the temporary work agency or an umbrella provider, and they must be paid an agreed amount in between assignments after a 12 week qualifying period.

Qualifying Clock

The Regulations have additional obligations that start after a qualifying period of 12 weeks; the qualifying clock is the term used to define whether the 12 weeks has been reached.

The clock can also be reset under certain circumstances as well as paused.

Qualifying Period

A worker has to work for 12 weeks to qualify for certain additional rights, this is known as the qualifying period.

Reasonable Offer of Employment

The agreed terms that an agency worker is willing to accept on any particular assignment. This will be agreed at outset between the umbrella provider and the worker, when the Swedish Derogation is being used, and a written record of the agreement needs to be kept.

Reasonable Offer of Work

The same as a Reasonable offer of employment.

Regulations

The Agency Workers Regulations 2010.

Secondment

Where an individual is on loan from one organisation to another. These arrangements will typically be out of scope.

Substantively Different

The term used to describe a new assignment with the same hirer where the job role is significantly different. As it is significantly different it is considered as an entirely new assignment and restarts the qualifying clock.

Swedish Derogation

The term used to describe the umbrella model that can be used when a worker sacrifices their right to equal treatment on pay.

Temporary Work Agency

The term to describe a company that supplies agency workers to work temporarily for a third party.

Umbrella Company

A company that employs workers on an overarching employment contract and allows them to claim travel and subsistence expense subject to certain requirements.

Working Time

Includes duration of working time; night work; rest periods and breaks and is one of the factors that must be equalised after the 12 week qualifying period.

Useful Links

Directgov website
AWR Legislation
AWR Guidance
HMRC IR35

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