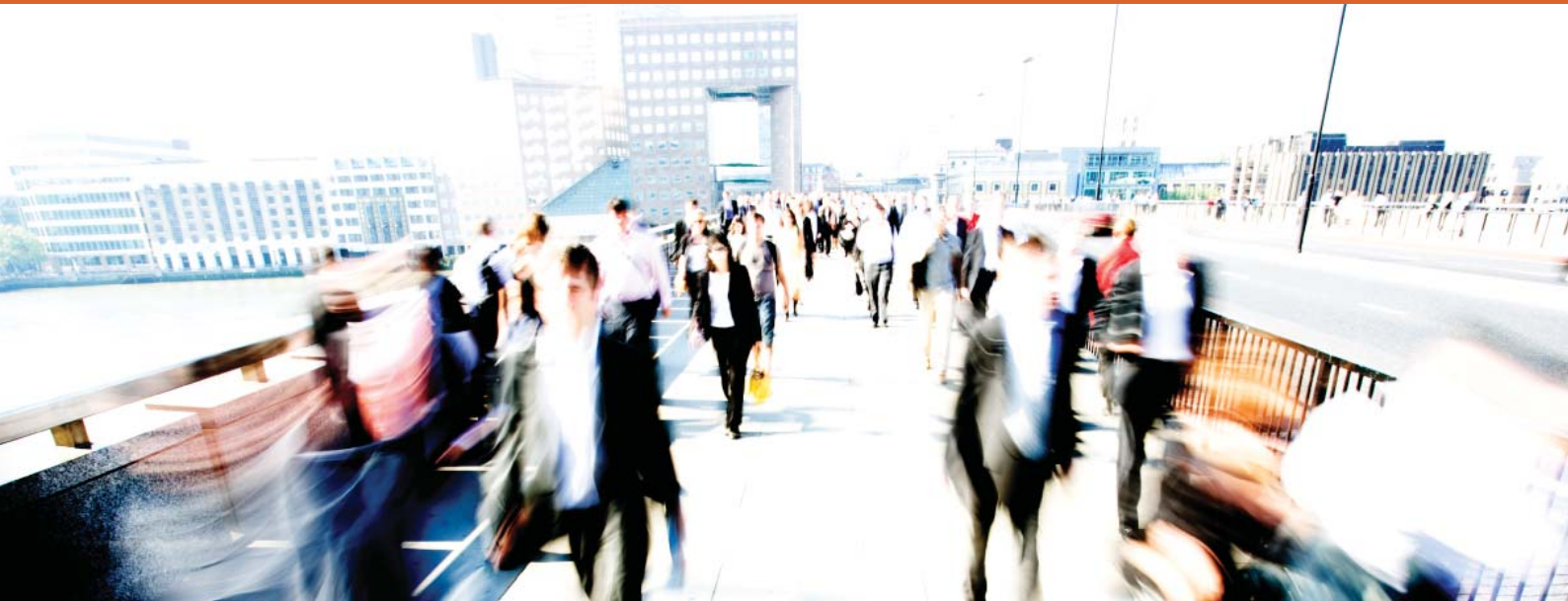


# Employment Brief

## Summer 2011



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## Welcome

The Agency Workers Regulations are due to come into force on 1 October 2011. In preparation for that the Government published a draft version of its guidance to be read in conjunction with the regulations. That guidance has now been finalised and was published on 6 May 2011. In this article we take a brief look at the main effects of the regulations so that employers can start planning for the impact of these on their businesses.

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# The Agency Workers Regulations 2010

## Who does it cover?

The regulations will cover agency workers, temporary work agencies and hirers. Those that are likely to be “outside” the regulations are those who are self-employed, those working on genuine managed service contracts, individuals finding employment through recruitment agencies and individuals on secondment or loan from one organisation to another.

## Qualifying periods

The right to equal treatment does not apply until an agency worker has undertaken “the same role”, whether on one or more assignments, with the same employer for 12 continuous calendar weeks. In order to establish whether agency workers have accrued qualifying service, the hirer is advised to ask workers for their work history to reduce their exposure to equal treatment liabilities. While there is no legal obligation to provide this information, the guidance states that a failure by a worker to disclose previous work with a hirer may be taken into account by a tribunal in any equal treatment claim.

in offering more than two short-term consecutive assignments to the same agency worker.

## Access to employment vacancies

From the start, agency workers are entitled to be informed by the hirer of any relevant vacant posts in the organisation to give them the same opportunity as a comparable employee or worker of the hirer to find permanent employment. This obligation only extends to the right to be advised of the vacancy rather than to be considered or appointed to the role. However, it is important to note that where applications from agency workers are rejected, discrimination rules apply.

## Access to facilities

The guidance clarifies the position that the agency worker has the right not to be treated less favourably in relation to “collective facilities and amenities”. The list of typical examples of collective facilities includes canteen or other similar facilities, child care facilities and the provision of transport services. Here the aim is to

*“The regulations will cover agency workers, temporary work agencies and hirers.”*

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The guidance clarifies whether qualifying service is lost when a worker moves between related companies. In fact, the qualifying period will restart when an agency worker moves between different companies. If, however, hirers adopt this approach (for example rotating agency workers between jobs) to deliberately prevent workers qualifying for equal treatment they run the risk of breaching the anti-avoidance provisions. It is important to note that tribunals will make an additional award of £5,000 where a hirer and/or agency are found to have breached this provision.

## Structured assignments

There is the opportunity for hirers to avoid the regulations by offering 11 week assignments referred to as “structured assignments”. The regulations make it clear that consecutive use of two or more “structured assignments”, which intend to avoid the qualifying period will be caught by the regulations. In any event, hirers will need to be very cautious

simply promote equality in respect of the facilities provided by the hirer.

## Conclusion

The guidance has been eagerly anticipated by hirers, agencies and agency workers. There are however concerns within the guidance over their application and interpretation. However, the aim is to address these before the regulations come into force. It is therefore important for hirers to use these regulations to ensure the needs of agency workers and temporary agency workers are met.

The guidance has no legal force in its own right. Practical and helpful as many of its recommendations are, ultimately it will be for the court to determine the correct interpretation of the regulations and the extent to which they implement the Agency Workers Directive correctly.

There are more areas covered in the regulations and a full version can be downloaded from our website [www.devonshires.com](http://www.devonshires.com)

# Fairness in pay

Economist Will Hutton published his government-commissioned final report on fair pay for senior public workers on 15 March 2011 in which he made a number of wide-ranging recommendations. Although his report focuses on public sector employees, he recommends that other measures in the report should also be adopted in the private sector, especially in organisations delivering public services. His report is therefore relevant to all employers who are concerned about fairness in pay and how to structure it, particularly at a senior level.

1. He rejects **arbitrary benchmarks** such as a cap for senior pay, expressed either as a multiple of lowest pay (the government's initial suggestion being a 20:1 cap) or the Prime Minister's pay, as a cap might encourage top pay inflation.
2. He recommends **improved transparency** so that public sector organisations track, publish and explain the multiple of CEO pay to median earnings each year in combination with:

agreed objectives. This will allow pay to vary down as well as up with performance. Middle managers could also opt-in. This would also be a pre-condition to any additional bonuses.

4. He suggests all employee performance related "gainsharing" pay schemes and **fair pay across the economy** where listed companies should also be required to track and publish top to median pay multiples in annual reports from January 2012, therefore making tracking pay multiples normal practice across the economy.

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- Sector-wide top pay benchmarks
  - Disclosure of pay and details of executives' roles and the linkage of their pay to performance
  - Scrutiny of disclosures and government intervention where necessary
  - A Fair Pay Code, operated on a comply or explain basis
  - Measures to improve recruitment, development and transferability of managers
  - New structures for performance-related pay (see below)
3. He suggests **earn-back pay** where senior executives' pay is more strongly linked to the meeting of performance objectives. Under this system, senior executives will have an element of their basic pay 'at risk'; to be earned back each year through meeting pre-



# Government announces reforms to free businesses from red tape

The Government has announced a range of measures to reduce the amount of regulation for small and new companies with the idea being that such companies can then concentrate on growing their companies instead of spending time following burdensome regulation.

As part of this, from 1 April 2011, companies with fewer than 10 employees and genuine start up businesses will be exempt from new domestic regulations for three years after the regulations come into force.

Other proposed measures identified to free business from red tape include:

- Repealing the regulations extending the right to request flexible working to parents of 17 year olds for all businesses, which was due to be introduced on 6 April 2011
- Not extending the right to request time off to train for firms with less than 250 people
- Introducing more transparency into the

Government's one-in, one-out rule by publishing the opinions of the Regulatory Policy Committee where they do not believe the evidence supports a new regulation and

- Lightening the audit requirements of smaller firms by matching the minimum required by EU directives, freeing small companies from unnecessary audit fees

## Quick update

### Default Retirement Age (DRA)

The DRA was abolished with effect from 6 April 2011, subject to transitional provisions. Any dismissal because of age taking place on or after 6 April 2011 will constitute direct age discrimination under the Equality Act 2010, unless it falls within the transitional provisions.

### The Equality Act 2010

A number of provisions contained in the Equality Act 2010 came into force in April 2011, including provisions relating to (i) positive action in recruitment and promotion and (ii) general public sector equality duties.

### Updated disability guidance

An updated version of the guidance came into effect on 1 May 2011. This takes into account changes introduced by the Equality Act 2010, including the removal of the list of "capacities", and the introduction of the concepts of protected

characteristics, perceived disability and disability by association.

### Additional paternity leave and pay

The right to additional paternity leave became available to parents of babies due on or after 3 April 2011 and to adoptive parents who are notified that they were matched with a child for adoption on or after that date.

### New statutory payment rates

From 3 April 2011, the standard weekly rates increased for the following payments:

- **Statutory maternity pay, statutory paternity pay and statutory adoption pay:** these will increase from £124.88 to £128.73 and the weekly earnings threshold will rise from £97.00 to £102.00.
- **Statutory sick pay:** this will increase from £79.15 to £81.60, with the weekly earnings threshold rising from £97.00 to £102.00.

- **Maternity allowance:** this will increase from £124.88 to £128.73, with the earnings threshold remaining at £30.00.

### Taxation of termination payments

HMRC published the Income Tax (Pay As You Earn) Regulations 2003 which affected the change from 6 April 2011. Employers must use an "OT PAYE" code for post-P45 payments, which has an impact on the amount of income tax the employer must withhold on termination of employment. Employers are no longer able to deduct tax from termination payments at basic rate only.

### Migration cap

A permanent migration cap will come into effect on 6 April, restricting the number of certain non-EU immigrants entering the UK to work. The new rules will replace the current interim cap.

reform. The review is based on employers' complaints about the various areas of employment law including:

- In relation to compensation for discrimination, it notes that high awards are seen by some businesses as encouraging weak, speculative or vexatious claims.
- With regard to collective redundancy, the Government intends to consider employers' complaints that the current requirement of 90 days' collective consultation when 100 or more employees face dismissal hinders their ability to restructure.
- As for TUPE, the Government is taking on board the criticism that the Regulations 'gold plated' the EU Acquired Rights Directive and are overly bureaucratic.

So far in its review of employment law the Government has:

- Consulted on reforming the employment tribunal system and increasing the qualifying

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### Employer-supported childcare

From 6 April 2011, higher rate or additional rate taxpayers who are new joiners to certain employer-supported childcare schemes will have the value of income tax and National Insurance Contribution's relief on these benefits limited to the relief available for basic rate taxpayers. Existing scheme participants and new joiners who are basic rate taxpayers (and tax relief for workplace nurseries) will not be affected.

### And finally...

The Government has announced that collective redundancy consultation periods, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and discrimination compensation awards are to be included in its review of employment law. The Government will start reviewing these areas this year but says that legislation will not necessarily be the route to implement any change if there is a case for

period to two years for an unfair dismissal claim

- Commissioned an independent review into managing sickness absence
- Launched a review of the compliance and enforcement regimes for employment law

The Government has stated it will shortly launch its long-awaited consultation on plans to extend the right to request flexible working to all employees and introduce a new system of shared parental leave from 2015.

# Upcoming Seminars

Devonshires' Employment Team has put together a comprehensive programme of workshops specifically targeted at HR professionals.

**Management toolkit: Dealing with disciplinary, grievances and capability - investigations, hearings and outcomes**

14 July 2011, 9.30am – 12.00pm

Delegate rate: £75

**Absence management: How to deal with the sick or absent employee**

13 September 2011, 9.30am – 12.00pm

Delegate rate: £75

**Agency workers: The new regulations and what they mean in practice**

29 September 2011, 9.30am – 12.00pm

Delegate rate: £75

**Employment contracts and policies:**

**What you need to have in place for your workforce**

18 October 2011, 9.30am – 12.00pm

Delegate rate: £75

**Maternity, paternity leave and flexible working: What you need to know about family friendly rights**

24 November 2011, 9.30am – 12.00pm

Delegate rate: £75

**Reorganisations and restructuring: How to implement these and how to vary terms and conditions of employment**

18 January 2012, 9.30am – 12.00pm

Delegate rate: £75

**Managing the recruitment process: Awareness of data protection and discrimination Issues**

9 February 2012, 9.30am – 12.00pm

Delegate rate: £75

To book your place(s) on any of our employment workshops, please email your name(s) and full contact details to [seminars@devonshires.co.uk](mailto:seminars@devonshires.co.uk).

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