

HEALTH AND SAFETY BRIEFING

AUGUST 2008

FOCUS ON AGENCY WORKERS

– INCLUDES NEW WORKPLACE POSTER ON BACK PAGE –



Who are agency workers?

Agency workers are people who are supplied by an intermediary (Employment Agency) to perform services on behalf of the user business.

With few rights – often no more than the legal minimum and sometimes not even that, normally with poorer terms and conditions than permanent staff, and little, if any, employment protection, agency workers are among the most vulnerable in our workplaces.

The exploitation of agency workers undermines conditions for all.

Employment Agencies are regulated by law the Employment Agencies Act 1973 (as amended) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the "Conduct Regulations").

The legislation distinguishes between "employment businesses" (EB) and "employment agencies" (EA). The EB employs workers to work on a temporary basis for an "end user". It follows the employment business is responsible for paying their employees. Confusingly the employee of an employment business is often referred to as an agency worker.

An "employment agency" (EA) will introduce a work seeker to a hirer or end user. The hirer may take the work seeker on a permanent contract (as an employee) at the outset and pay a fee to the agency for the introduction.

Alternatively, the agency worker or "work seeker" may be required on a temporary or fixed term basis. In such circumstances the hirer may pay the agency on an hourly rate basis, a proportion of which is passed on to the worker. In addition, the contract between the worker and the agency often specifically states that the worker is not an employee of the agency and the agency does not guarantee work. There will be no contract between the worker and the hirer in most cases. It is this latter group that are most vulnerable.

In addition the law relating to agency workers is constantly disputed. There have been a number of cases recently where the status of the agency worker has been considered – "employee or self-employed" – as the status of the agency worker is significant in terms of the rights they have.

The two most important tests that must be satisfied in all cases for someone to be classed as an employee are:

1. Control

The employer must exercise some day to day control over the worker; and

2. Mutuality of obligation

There must be an obligation the employer to provide the work, and a corresponding obligation on the employee to perform it.

These cases can turn on particular facts and a recent Court of Appeal case demonstrates the problem.

In James v London Borough of Greenwich (www.bailii.org/ew/cases/EWCA/Civ/2008/35.html) on 5 February 2008 the Court found that as a general rule (but not always) a temporary agency worker supplied by an employment agency to an end-user client would not be an employee of the client nor an employee of the agency itself.

Merana James worked continuously for Greenwich Council through employment agencies over a period of several years. Written agreements between her and the agencies expressly provided that she would carry out her work as a self-employed 'temporary worker' and that her work would not give rise to a contract between herself and the end-user of her services. On her return to the Council after a period of sickness absence, she was told she was no longer required because the agency had sent a replacement. Ms James tried to bring a claim of unfair dismissal, but the Court said she could not.

The Court held that, although Ms James could hardly be described as a 'temporary worker', the employment tribunal had correctly applied the tests of control, mutuality of obligation and necessity in assessing whether a contract of employment should be implied.



As a postscript, Lord Justice Mummery stated that the Court was 'fully aware' of the controversy surrounding the lack of protection for agency workers, but stressed that in these circumstances it is not for the courts to 'express views about a change or initiate a change' and suggested that the vast sums of money spent taking agency cases through the courts might be better spent on 'making representations to and through bodies which can pursue the debate on policy or even reform the law.'

Some employers try to take advantage of the confusion in the current law and as a result are breaching health and safety law in their treatment of agency workers.

For example the union has received reports that agency drivers are given no health and safety training or induction and that agency staff who need personal protective equipment are told to pay for their own or are forced to pay a deposit, or are forced to share equipment such as footwear.

But under health and safety law, legal duties always apply, no matter the employment status of an agency worker or whatever the nature of their contractual terms. Agency workers should be considered the same as employees for health and safety purposes even if they are not for tax and National Insurance. Whether agency workers are employees of the agency or of the user company they are entitled to the same health and safety protection – and this is the joint responsibility of both the agency and the user business.

The Health and Safety Executive's advice to employers in relation to employee status is as follows:

'A worker is likely to be an employee if:

- *the employer makes deductions for national insurance and income tax from the money you pay them;*
- *the employer directs and controls where, when and how they work;*
- *the employer supplies most of the materials and equipment the workers uses at work; and*
- *the worker cannot supply a substitute when they are unable to work.'*

Whatever the employment status of a worker, and whoever the employer, the agency and the end-user have a shared duty to protect the health and safety of agency workers. They must clarify and agree at the start of the contract the arrangements for day-to-day supervision, direction and control of the work the agency workers will be doing. This must include health and safety arrangements, for example, providing health and safety training and information (see also below under Law).

Ideally such contracts should be in writing, and Unite safety representatives should always exercise their right to information and request copies of them.

The HSE advises further:

'To avoid any misunderstanding and confusion, labour providers and users are advised to clarify their relationship and agree their respective responsibilities including the practical arrangements for the day-to-day management and supervision of the workers. Any agreement should be formalised in writing by way of a contract, service level agreement or other form of agreement.'

Source:

www.hse.gov.uk/migrantworkers/law.htm

If an agency or a host employer tries to argue that an agency worker is not an employee at all, you can remind them that even if this is correct the employer still has a duty to to protect the agency worker under Section 4 of the Health and Safety at Work etc Act 1974 (HSWA).

Section HSWA 4 imposes duties on persons in control of premises (or the means of access to or egress from these premises) to ensure that the access and egress to the premises used by people, and any plant or substance in the premises, are safe and without risks to health (see also note below about the HSWA).

It is arguable, therefore, that the host employer is also under a duty under Section 4 to (for example) supply Personal Protective Equipment (PPE) to agency workers working on their premises if a risk assessment has found that it is necessary to supply PPE to enable them to work safely.

And see below regarding the Management Regulations, particularly in relation to risk assessments.

The host employer would also have a general duty of care in negligence at common law to visitors and agency workers and face responsibility to pay damages for any injury arising out of their negligence.

GANGMASTERS LICENSING ACT 2004

This act was passed to help stop the exploitation of workers – who are usually migrant workers – by gangmasters. It requires the licensing of activities involving the supply or use of workers in connection with agricultural work, gathering shellfish and the processing or packaging of agricultural produce. It makes it an offence punishable by a fine and/or imprisonment to act as a gangmaster without a licence and is enforced by the Gangmasters Licensing Authority on which Unite is represented.

Employment and user businesses subject to the Gangmasters Licensing Authority requirements must also comply with relevant licence conditions that may be set by

SOME RELE

Health and Safety at Work etc Act 1974

Employers have a legal duty to ensure the health, safety and welfare of people who are working in their undertaking regardless of their employment status. This includes not only their employees but also anyone else who might be harmed as a result of their activities. This may include people such as visitors, contractors, delivery drivers and in particular agency staff, who are sent to work on their premises.

Employers have a duty not to charge employees for anything which they must provide by law. So, for example, if a risk assessment finds that it is necessary to provide personal protective equipment to enable the work to be carried out safely, then under the Personal Protective Equipment at Work Regulations this equipment must be provided free of charge.

Employees and the self-employed also have duties: to work safely and ensure that they do not endanger others.

Safety Representatives and Safety Committees Regulations 1977

Unite safety representatives have a range of rights and functions under these regulations including information, investigating accidents and dangerous occurrences, regular inspection of the workplaces, to be consulted about health and safety issues in the workplace and represent members' views on health and safety at work. All these can be used to ensure that improvements are made at work and the right to a healthy and safe workplace for all members including agency workers is maintained. Safety representatives may wish to consider carrying out a special inspection to focus on agency workers. See below.

Management of Health and Safety at Work Regulations 1999 (as amended)

These important regulations impose a range of duties on employers which are all relevant to agency workers. It is most important to remember that when a business uses agency workers, the business and the agency have a shared responsibility to protect their health and safety. Neither can transfer their health and safety responsibilities to someone else so it is crucial that at the start of any contract that the agency and the end-user clarify and agree the practical arrangements for health and safety management of agency workers. This will include sharing of information about the work to be done and the hazards, risk assessments, ensuring competency to do the job, deciding who will deliver health and

VANT HEALTH AND SAFETY LAW

PLEASE NOTE THIS IS ONLY A SELECTION OF THE MOST IMPORTANT MEASURES

safety training and who will provide personal protective equipment if this is necessary.

Employers' health and safety legal responsibilities include:

- Carrying out risk assessments to identify risks to the health and safety of their employees and others, including agency workers on their premises, and put in place preventive and protective measures to avoid their employees (and others including contractors, agency workers and visitors) being harmed.
- Carrying out special risk assessments in relation to particular groups of workers including young workers and pregnant workers.
- Providing appropriate instructions and comprehensible information regarding any risks to health and safety of their employees and agency workers alike.
- Taking account of the needs of disabled workers.
- Sharing information with the employment agency which in turn should pass this on to the agency workers who will be doing the job.
- Making sure health and safety information is capable of being understood by agency workers – and if necessary making arrangements for those who may not be able to read or understand English well.
- Ensuring that agency workers have the necessary skills to enable them to do the job they are contracted for (see also below under the Employment Agencies Act).
- Providing health and safety training for all employees, and making provision for agency workers.
- Co-operating with each other to ensure that health and safety arrangements are made to protect agency workers including sharing information about health and safety – and deciding who will ensure that these responsibilities are carried out. This means that the agency has a responsibility to ensure that risk assessments have in fact been carried out and implemented by the user business and that the results are passed on to them. If the agency is not satisfied that this is not the case they should carry out their own site visit before any agency workers start working there. Agencies can also monitor the user business's health and safety performance for example by asking for accident and ill-health reports.

- Monitoring agency workers' health and safety – for example providing health surveillance for agency workers who may be working with hazardous chemicals and making sure that the workers are given comprehensible information about these health checks. The user business and the agency should come to a clear agreement as to which party will provide health surveillance or other health monitoring and how it will be implemented.
- Consulting with Unite safety representatives and agency workers on all these arrangements.

Personal Protective Equipment at Work Regulations 1992 (as amended)

If the end user business provides personal protective equipment (PPE) for their employees, then agency workers will also need PPE if they are exposed to the same risks. PPE must be suitable and be provided free of charge and the legal responsibility for providing it lies with whoever is the worker's employer – this might be the agency or the user business. An employer cannot pass on its legal responsibility to someone else to provide PPE.

Agencies and businesses using agency workers must work together to ensure that the right equipment is provided and come to an agreement on this. The agency workers should be consulted about the PPE and given a choice of suitable equipment.

The official HSE guidance (L25) **Personal Protective Equipment at Work** (Second Edition 2005) gives the following advice to employers [para 30]:

'You cannot charge agency workers who are your employees (or who may be legally regarded as your employees) for PPE, or ask them to pay a refundable deposit on PPE you are lending them. You can charge a worker for PPE if they are genuinely self-employed. If you are a hirer providing PPE to a worker employed by an employment business [agency] you can make a charging arrangement with the employment business, but the employment business cannot pass the charge on to the worker or permit you to charge the worker directly.'

Health and Safety (Display Screen) Regulations 1992 ("DSE regulations") (as amended)

Agency workers who use computers and other VDU equipment which falls under the DSE regulations will require suitable workstations and equipment, and rest breaks, to enable them carry out their duties safely and assessments should be carried out for agency workers in consultation with them.

Working Time Regulations 1998 (WTR) (as amended)

Under WTR all workers have a number of entitlements:

1. To work no more than 48 hours a week on average. Though workers can sign an "opt out" and work more than 48 hours, working longer than that is likely to cause fatigue and associated problems such as loss of concentration, and put the worker, and his colleagues, at greater risk of accidents as a result.

The HSE advises *'Workers who have signed an "opt out" from the Working Time Regulations can work more than the 48 hour working week. However, under the Health and Safety at Work Act (Section 2) employers must not put their employees at risk from working excessive hours. This is because working excessive hours can put the health and safety of those workers at risk and others who may be affected by their activities. It is therefore unacceptable to allow employees who have opted out of the WTR to work excessive hours.'*

2. To rest breaks - a minimum of 20 minutes where an adult worker's daily working time is more than six hours.
3. To 4 weeks' paid annual leave.
4. To free health checks if they are night workers.

There are special rules to protect workers under the age of 18.

Regulation 36 is important for agency workers. It makes the party (whether it is the agency itself, the user business or another party), who actually pays the agency worker for the work they do, responsible for ensuring that the Working Time Regulations are complied with in respect of that worker.

NOTE: There are some different Working Time provisions for transport workers such as professional drivers – but agency drivers are of course entitled to the same health and safety protection as other agency workers.

Workplace (Health, Safety and Welfare) Regulations 1992 (as amended)

These lay down legal requirements about a whole range of important issues including workplace temperature, lighting, drinking water, facilities for rest and eating, ventilation, provision of sanitary and washing facilities, rest areas, access, space and workstations.

OTHER RELEVANT LAW

Employment Agencies Act 1973 (as amended)

Employment agencies must comply with the minimum standards of conduct set by the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

If you are a worker:

An agency must not charge for finding or trying to find you work (with some exceptions, mainly in entertainment and modelling)

An agency employing you to do temporary work must give you written terms, and must pay you, even if it has not been paid

An agency which collects your pay from an employer must pass it to you within ten days, unless you request otherwise. Normally this only applies to entertainment and modelling.

If you are a hirer:

An agency should check workers have any qualifications required by law
An agency should obtain enough information to show a worker is suitable for the job

Source: Department for Business Enterprise and Regulatory Reform
www.berr.gov.uk

The HSE advises:

'To avoid any misunderstanding and confusion, labour providers and users are advised to clarify their relationship and agree their respective responsibilities including the practical arrangements for the day-to-day management and supervision of the workers. Any agreement should be formalised in writing by way of a contract, service level agreement or other form of agreement.'

Source:
www.hse.gov.uk/migrantworkers/law.htm

UNITE ACTION ON AGENCY WORKERS

FOOD FACTORY – UNITE ACTION

Unite took action in support of young Polish workers, many of whom were Unite members, working for a company making prepared salads for leading catering companies, pubs and rail companies.

They worked extremely long hours in an unsafe working environment. The workers claimed that they were forced to work all day in sodden clothing, could not access toilets during a shift without permission and at times working up to 16 hours a day. They also received no contracts of employment or training.

As a result of Unite action the employer realised that it was not quite so easy to ignore workers' rights! Contracts were issued to all employees, which included the correct paid holiday entitlement and all employees were given the correct personal protective equipment.

LOCAL AUTHORITIES – UNITE ACTION

SALFORD CITY COUNCIL

During 2007 the Unite members employed by Salford City Council in the North West fought a successful campaign to end casualisation of jobs in the Council's refuse disposal and street cleansing department.

About 140 workers employed by the Council were working alongside large numbers of "casuals" employed by two employment agencies. These "casuals" were obliged to get up very early on a daily basis to queue up in the hope that work would be offered to them. They were therefore denied basic employment rights and job security. They were not only employed at lower rates than permanent staff, but they were also obliged to pay for their own uniform and personal protective equipment.

Unite's campaign to improve workplace organisation across Salford Council resulted in the creation of a workplace organising committee. There was a massive response to a petition organized by Unite calling for the end of unfair treatment for agency workers. Members balloted for strike action and there was considerable local and national media interest including a BBC North West Tonight programme which highlighted the unfair treatment of agency workers, and which generated considerable public support for the campaign.

As a result of this campaign, Salford City Council and Unite reached a new agreement which resulted in a review of the refuse collection services and street cleansing and brought casualisation to an end. And more members came forward as safety representatives, resulting in a safer and healthier workplace for all.

FLINTSHIRE COUNTY COUNCIL

With the support of the joint unions, including Unite, Flintshire County Council is piloting a number of initiatives in relation to agency workers. This includes providing every agency worker, regardless of their length of contract, with the authority's health and safety induction training. The authority has also provided its standard health and safety training to some of the agency recruitment staff so that they in their turn can then train the agency workers they recruit for the authority. Additional training is offered to agency staff whenever specific courses are arranged for permanent staff: for example agency staff attend half day courses on manual handling.

UNIONS AT SOUTH LANARKSHIRE COUNCIL BUILDING SERVICES

are working with their employer this year to ensure that a review is carried out of the safety standards of all agency staff employed on a variety of tasks in Building Services. It is expected that this will focus on checking qualifications, ensuring correct training is given and proper equipment is provided for agency staff.

FURTHER INFORMATION

Unite briefing on Young Workers

available from Susan.Murray@unitetheunion.com

HEALTH AND SAFETY EXECUTIVE

www.hse.gov.uk

Working Together. Guidance on health and safety for contractors and suppliers

HSE Indg268 (rev)

Use of Contractors. A joint responsibility

HSE Indg368

HSE Sector Information Minute: SIM 01/2007/04

HSE Topic Inspection Pack on Migrant Working

Health, Safety, Premises guide on agency workers

www.hse.gov.uk/workers/agencyworkers.htm and follow link to Government Businesslink website

Personal Protective Equipment at Work L25

HSE Books

TUC: Safety and Migrant Workers

www.tuc.org.uk or available from Unite Research Department, 128 Theobald's Road, London WC1X 8TN

Department for Business, Enterprise and Regulatory Reform (BERR)

Employment Agency Standards Inspectorate

This investigates complaints about employment agencies and infringements of the conduct regulations.

www.berr.gov.uk/employment/employment-agencies/index.html

Enquiry line 0845 955 5105 (Monday - Friday 9:30 - 16:30).

Gangmasters Licensing Authority Code of Practice (H&S Section)

www.gla.gov.uk



Agency workers checklist for Unite Safety Representatives:

Ensuring that all workers have the same level of health and safety protection including agency workers

Note: The checklist has been drafted so that it can be used by safety representatives as a tool to check compliance by both the agency and the user business and the term "employer" is therefore inter-changeable to mean either the agency or user business.

GENERAL

Does your health and safety policy include agency workers and state who will take responsibility for their health and safety? Y / N

Is it clear whose responsibility it is to ensure that agency workers have the appropriate skills and training for the job? Y / N

Is there a clear written agreement between the user business and the agencies they use as to which of them is responsible for health and safety management, including delivering health and safety training, providing health and safety information to agency workers and providing personal protective equipment (free of charge)? Y / N

Does the agreement between the agency and the employer follow good practice and cover the following areas:

1. Are all workers, including agency workers, made aware of their own responsibilities in relation to health and safety? Y / N
2. Do agency workers know who actually employs them? Y / N
3. Is Employers' Liability Insurance in place to cover all employees, including agency workers? Y / N

UNION ORGANISATION

Does your branch encourage the election of safety representatives from amongst agency worker members at your workplace? Y / N

Are safety representatives and shop stewards given access to agency staff when they first start work? Y / N

Does the branch ensure that agency worker members are fully included in union activities and have access to union education? Y / N

CONSULTATION

Does your employer consult safety representatives about health and safety arrangements for agency workers? Y / N

Does your employer consult agency workers on health and safety matters? Y / N

Does your agreement ensure that the rights of agency workers are fully respected? Y / N

RISK ASSESSMENT

Have suitable and sufficient assessments of the risks to which workers, including agency workers, been carried out? Y / N

Does your employer involve you in risk assessments particularly in respect of work to be carried out by agency workers? Y / N

Does your employer involve agency workers in risk assessments? Y / N

Are special risk assessments carried out (before they start work) for agency workers who are of child-bearing age, are pregnant, who are young workers or have a disability? Y / N

INFORMATION AND TRAINING

Does your employer provide health and safety training and information for agency workers? Y / N

Does your employer provide induction training for agency workers before they start work? Y / N

Does your employer provide job-specific training for agency workers

for example in manual handling, operation of machinery etc? Y / N

Is this training and information delivered for all in a comprehensible form taking account of literacy and/or language issues? Y / N

What steps are taken to ensure that the training is understood and acted upon? Y / N

Is an interpreter provided if necessary? Y / N

Does induction training for agency workers include information about fire safety, first aid, emergency procedures, reporting accidents and near misses? Y / N

Do agency workers know whom to contact to raise concerns about health and safety? Y / N

WELFARE

Are suitable and sufficient sanitary conveniences available for all? Y / N

Are suitable and sufficient washing facilities available for all? Y / N

Is wholesome drinking water supplied for all? Y / N

Are there adequate facilities for accommodation of clothing and changing clothing? Y / N

Are there adequate rest facilities for rest and to eat meals? Y / N

Are there adequate rest facilities for pregnant workers and new mothers? Y / N

HEALTH SURVEILLANCE

Is there an agreement in place between your employer and the agency to ensure that health surveillance is provided (if necessary) for all workers including agency workers? Y / N

SICKNESS ABSENCE AND OCCUPATIONAL HEALTH

Does your sickness absence policy provide for equal treatment for agency workers and permanent staff? Y / N

Do all staff, including agency workers, have access to occupational health provision? Y / N

WORKING HOURS

How are the working hours for agency workers monitored to ensure that they are able to work safely? Y / N

Are accurate records kept of hours being worked? Y / N

Do terms and conditions comply with the Working Time Regulations, eg do all workers, including agency workers, have suitable rest breaks? Y / N

PERSONAL PROTECTIVE EQUIPMENT (PPE)

Is there a clear agreement between your employer and the agency as to which will supply PPE to agency workers? Y / N

Are agency workers consulted about PPE? Y / N

Is suitable PPE provided free of charge to agency workers and are they trained how to use it? Y / N

OTHER ISSUES

Are there any health and safety issues or hazards specific to your workplace not covered above?

This leaflet provides advice and information to help safety reps and shop stewards pursue equal treatment at work for agency workers using the legal and other tools at our disposal, and includes a new workplace poster on the reverse of this page.

We also want to hear from you about agency workers. Please share information about your campaigns, actions – and successes.

Please contact Susan Murray on
0207 611 2596 or email
Susan.Murray@unitetheunion.com

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Published by Unite the union
35 King Street, Covent Garden, London WC2E 8JG

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CONTACT

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www.unitetheunion.com