

Openspaces IT Recruitment Agency

AWR Freelancers Guide

Guidance for employment agencies/businesses and engagers of freelancers

10/08/2011

Compiled from the PCG Legal guidance <http://www.pcg.org.uk/agencies>

What are The Agency Workers Regulations 2010?

The Agency Workers Regulations 2010 are intended to protect vulnerable low paid “agency workers” (“temps”), and safeguard the positions of permanent employees from being undercut by lower-cost agency workers.

The regulations are designed to achieve this by enshrining in law the rights for an agency worker to receive equal treatment, comparable to that which the worker would have received, had he/she been engaged directly by the hirer. **The regulations come into effect on 1st October 2011.**

What rights do the Agency Workers Regulations 2010 give?

12 week rights: Once an ‘Agency Worker’ has been in a role for a particular hirer for more than 12 weeks, the individual’s rights in terms of how much he/she is paid, holiday entitlement, and working hours must be no less favourable than they would be if the individual had been directly employed by the hirer, such that the individual is not discriminated against on the grounds of being an “Agency Worker”. The hirer, the temporary work agency, and any other companies in the supply chain all have responsibilities for ensuring that these rights are complied with.

Day 1 rights: There are other ‘day 1’ rights for which the hirer alone is responsible. These include the right to be treated equally in relation to access to site facilities, and to access to information about job opportunities.

A full copy of the regulations can be found at <http://www.bis.gov.uk/policies/employment-matters/strategies/awd>

What is a temporary work agency?

If an agency supplies individuals to work under **the supervision and direction of third parties**, it will be a ‘temporary work agency’ this may also include umbrella companies.

Who is not an agency worker?

An individual will not be an Agency Worker – and so will be out of scope of AWR

EITHER if they are in business on their own account

OR if they are not working under the ‘supervision and direction’ of the hirer

The regulations specifically exclude those who are in business on their own account, where the status of the agency or end client is that of a customer of that business. An individual is not an agency worker if;

(a) the contract the individual has with the agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

How to determine whether or not the individual is in fact carrying on a profession or business undertaking;

- The business is the utilisation of the individual freelancer’s expertise, by a succession of engagements
- The company keeps accounts, and may make a profit or a loss
- The owners of the company stand to benefit from the company’s profits.
- Umbrella workers will generally not be in business on their own account and so will generally fall within the scope of the regulations

To obtain the greatest degree of comfort that an engagement with a freelancer will be out of scope of the AWR, the contract under which the freelancer is engaged will contain an express statement to the effect that the freelancer is an independent business, and enters the contract in the course of that business.

What about supervision and direction of a hirer?

Absence of ‘supervision and control’ may result in some umbrella workers falling outside the scope of AWR, even though they may not generally be able to claim to be in business on their own account.

There may be a degree of risk for an agency (who may have limited knowledge of the reality of whether supervision and direction is in fact exercised by the Client) to rely on lack of ‘supervision and direction’ as the basis for forming a view that AWR does not apply.

However, an agency which obtains in good faith a **contractual assurance** from a Client that it will **not exercise supervision and direction**, and a **corresponding assurance** from a freelancer (as will often be the case anyway in IR35-friendly contracts) may be justified in concluding that for this reason, the individual falls outside the definition of an Agency Worker, and so that the AWR do not apply.

This guide is not intended to constitute legal or professional advice, and neither Openspaces nor the document’s authors accept any liability for any action or inaction taken on the basis of this document. This document is intended for general guidance and information purposes only. It has been prepared in good faith and represents Openspaces own interpretation of the law; reasonable efforts have been made to ensure accuracy. Whilst this document has been prepared with the help of legal advice and research, its content is of its nature generalised and it is no substitute for specific legal advice. Individual circumstances will always vary, and specialist professional or legal advice should be sought where required.

| | Employment-type contract | B2B contract |
|---|--|--|
| Requirements | To fill a role and work as directed from time to time | To perform specified tasks / produce outcomes / deliverables |
| Mutuality of obligation, and payment | General entitlement to payment for contracted time spent, regardless of quality of work; there may be an obligation (express or implied) to provide work or pay in lieu, even during a notice period | Entitlement to payment based on delivery of requirements; may or may not be measured on time basis; but no general obligation to provide work, and no obligation to do tasks other than those contracted |
| Control | Engager has broad rights to control; individual may expect to be supervised and directed | Contractor is engaged to provide expertise in relation to the requirements, need for control limited. Would not generally expect to find rights to control which extend beyond what is necessary within the scope of the tasks |
| Personal service | Employee / worker places himself at the disposal of the hirer and must personally work as instructed | May be a right to substitute, the core of the engagement is the provision of the tasks / outcomes / deliverables, and not the provision of a named individual to be at the disposal of the hirer |
| Financial risks / Opportunity for profit | Little or no risk carried Profit opportunity limited to payment at agreed rate for time spent | Takes responsibility for what is delivered; may include correction of defective work at own cost and in own time Working efficiently may give greater opportunity for profit in this and/or future engagements |

This guide is not intended to constitute legal or professional advice, and neither Openspaces nor the document's authors accept any liability for any action or inaction taken on the basis of this document. This document is intended for general guidance and information purposes only. It has been prepared in good faith and represents Openspaces own interpretation of the law; reasonable efforts have been made to ensure accuracy. Whilst this document has been prepared with the help of legal advice and research, its content is of its nature generalised and it is no substitute for specific legal advice. Individual circumstances will always vary, and specialist professional or legal advice should be sought where required.

What do I have to do if I want to use freelancers and avoid having to worry about AWR?

By engaging genuine freelancers who are in business on their own account on B2B terms, both agency and hirer can have confidence that the burdens and risks associated with AWR will not apply to the engagement. Freelancers themselves are likely to welcome being engaged on B2B terms because of their IR35-friendliness, and because such an engagement recognises and respects their position as carrying on their own businesses. It is important that independence can be demonstrated from both the agency and the client so as to avoid legal challenges asserting 'implied' contracts of employment. Similarly, contract documents and practices must be consistent so as to avoid arguments that they are a 'sham'. There are benefits for all parties involved - freelancers, agencies, and end clients - in ensuring contracts are on a solid B2B basis.

IF YOU ARE A FREELANCE/CONTRACTOR

Care must be taken in all dealings with agencies to confirm not only that you are 'in business on your own account, you have a limited company etc but that matters of discretion, choice and autonomy are always stressed. The key words in the Regulations are that those who are 'in scope' are subject to 'supervision and direction'. Genuinely self-employed people should not be capable of being described as such. Performance appraisals to determine pay or enhanced should be avoided. This is another dimension of the risks associated with the fact that the client relationship should not exhibit submission to 'supervision and direction' so all documents need to be carefully perused from this perspective.

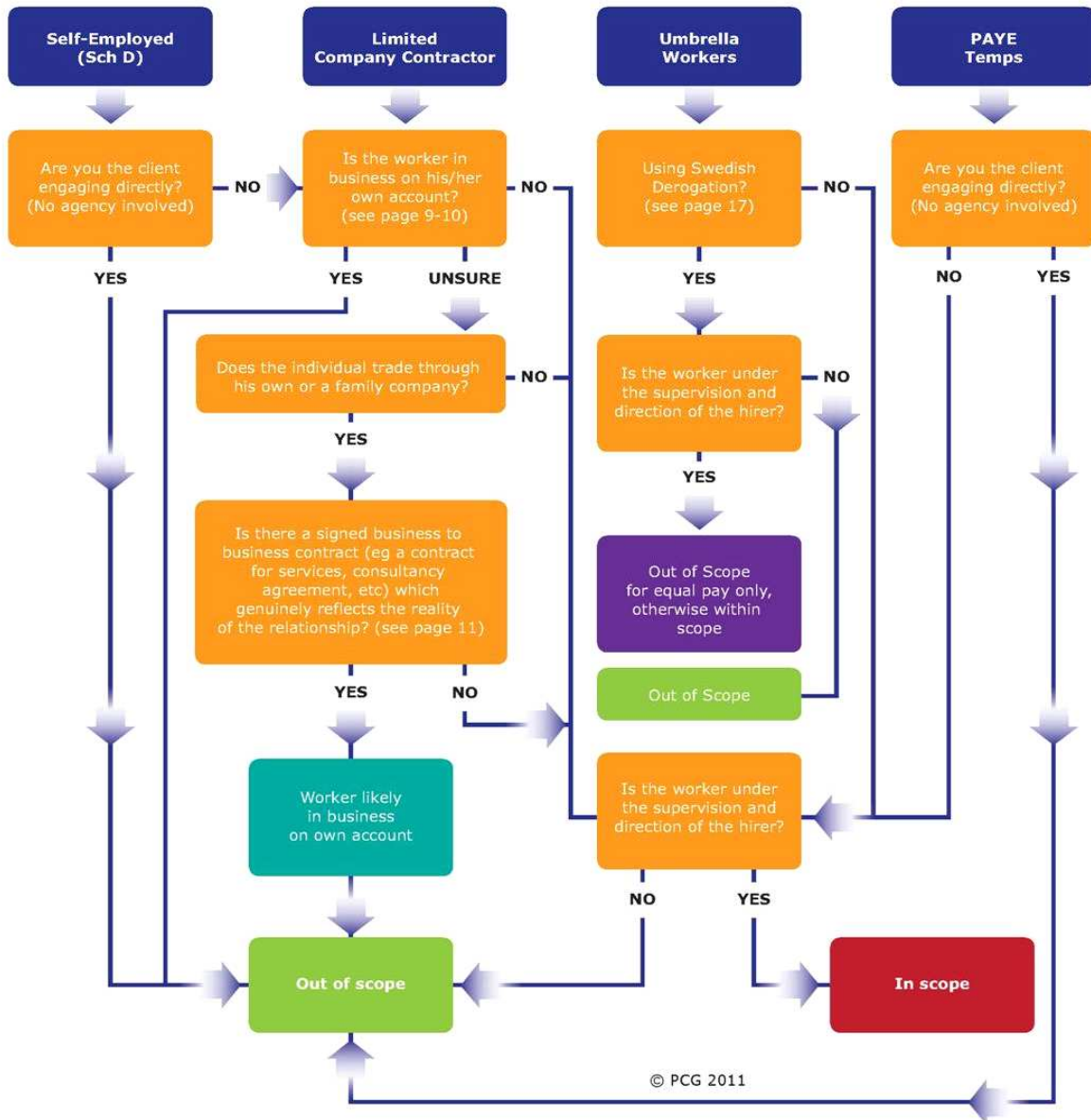
IF YOU ARE AN AGENCY

- Check the status of the freelancer being engaged, are they an umbrella worker or in business on their own account
- If an umbrella worker, ascertain the method of operation ('supervision and direction') to assess any risk
- Take care to use a B2B / 'IR35 friendly' contract which is suitable for the requirement, and will genuinely reflect working practices
- Avoid imposing unnecessary contractual requirements for 'supervision and direction'
- Keep contractors/freelancers aware of their status and rights (if applicable) under the AWR

IF YOU ARE A HIRER (THE 'END CLIENT')

- Check the status of the freelancer being engaged, are they an umbrella worker or in business on their own account
- If an umbrella worker, ascertain the method of operation ('supervision and direction') to assess any risk
- There should be no AWR-related concerns where genuine freelancers, in business on their own account, are engaged on B2B terms. Engagement on the basis of non-controlling B2B / 'IR35 friendly' contracts will help contain your risks
- Try not to impose unnecessary contractual requirements for 'supervision and direction'
- Take steps to ensure that working practices reflect the contract.
- Keep contractors/freelancers aware of their status and rights (if applicable) under the AWR

In or Out of Scope? Quick Start Guide



Swedish Derogation

Workers, such as those who use an umbrella, are exempt from the need to receive “equal pay” under the AWR if they are paid between assignments and some other formalities are complied with.

This guide is not intended to constitute legal or professional advice, and neither Openspaces nor the document's authors accept any liability for any action or inaction taken on the basis of this document. This document is intended for general guidance and information purposes only. It has been prepared in good faith and represents Openspaces own interpretation of the law; reasonable efforts have been made to ensure accuracy. Whilst this document has been prepared with the help of legal advice and research, its content is of its nature generalised and it is no substitute for specific legal advice. Individual circumstances will always vary, and specialist professional or legal advice should be sought where required.