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**East Dunbartonshire Council**

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## ***Agency Workers Regulations 2010***

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**November 2011**

## **AGENCY WORKERS REGULATIONS 2010**

### **INTRODUCTION**

This guidance aims to outline the principles, procedures and accountabilities within the Council approach to Agency Regulations.

There are various circumstances within which agency resources are used within the Council. These can be as a result of a short term, immediate requirement to ensure sustainability and effective service delivery.

Agency resources are considered by managers in line with individual service circumstances, with the intention of continuing to deliver high quality services.

Whilst recruitment procedures and established resourcing methods are recognised, circumstances do arise whereby service delivery requirements will mean that immediate solutions need to be put in place in order to continue effective service delivery.

- The need for additional resource will be identified by the service, either through a post becoming vacant or as a result of a workload issue, or immediate pressure on a service
- This may be due to the need to comply with required ratios of employees to children or clients, for example in Early Years, or in areas within Social Work, or due to legislative accountability
- Emergency cover should be provided by an agency worker for a time-limited period and should, where appropriate, run alongside recruitment processes being requested and taken forward
- The Redeployment / Displacement List should be consulted in the first instance. This would identify if a skills match exists between the employee and the post. If so, then the vacant post could be offered as SAE to the displaced employee/employee seeking redeployment. This would be processed as a priority
- If skills are not available via these processes then the Internal / External recruitment process should be considered dependant on the requirements
- If an agency worker is resourced to backfill a vacancy then the service must ensure that, if there is a requirement, then advertising is in place while the post is backfilled by the agency worker
- Information used within this process, i.e. identifying need for agency, justification and Head of Service approval must accompany requests made via the Vacancy Control process

### **BACKGROUND**

The Agency Workers Regulations came into effect on 1 October 2011.

The legislation gives agency workers entitlement, after a qualifying period of 12 weeks in the same job, to the same basic employment and working conditions as if they had been recruited directly. Equal treatment is not required in respect of all of the terms and conditions that the person would have received if they had been recruited directly, but covers terms and conditions set out in, for example, standard contracts or pay scales.

Key elements of entitlement are:

- Key elements of pay (e.g. basic pay, overtime payments, shift allowances, but not e.g. occupational sick pay, occupational pensions, occupational maternity, paternity or adoption pay, notice pay, paid time off for Trade Union duties, travel expenses)
- Duration of working time
- Rest periods
- Annual leave
- For pregnant employees – the right to paid time off for ante natal appointments

### **QUALIFYING PERIOD**

The 12 week qualifying period is regardless of how many hours an agency worker works each week, and the 12 week period is calculated based on 12 calendar weeks, i.e. any seven day period starting with the first day of an assignment.

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The 12 week qualifying period is not retrospective. For any agency workers currently within EDC the 12 week qualifying period started on 1 October 2011.

### Breaks within the 12 week qualifying period which will not entitle the agency worker to complete the qualifying period

- The agency worker begins a new assignment with a new hirer
- The agency worker remains with EDC but in a new role ('substantively different' role)
- There is a break between assignments with EDC, but not for any of the reasons detailed below

### Breaks within the 12 week qualifying period, where service will be paused until agency worker's return

- The break is for no longer than 6 calendar weeks (and the agency worker then returns to the same role with EDC)
- Break due to sickness or injury of up to 28 weeks
- Break which is for the purpose of taking leave to which the agency worker is entitled, including annual leave
- Break to allow the agency worker to perform jury service, of up to 28 calendar weeks
- Break due to industrial action at the employer's establishment
- Break due to regular and planned shutdown of the workplace, e.g. at Christmas

### Breaks where service continues to run

- In the event of an agency worker taking a break due to pregnancy, childbirth or maternity, which take place during pregnancy and up to 26 weeks after childbirth
- Any breaks due to maternity leave, adoption leave or paternity leave

In these cases the 'clock' will tick for the duration of the assignment originally intended, or the likely duration, whichever is longer.

**Table 1: Summary**

Type of break	Effect on the 12 week qualifying period
<ul style="list-style-type: none"> <li>● Agency worker begins a new assignment with a new hirer</li> <li>● Agency worker starts a 'substantively different' role</li> <li>● Breaks between assignments of more than 6 weeks</li> </ul>	<ul style="list-style-type: none"> <li>● New qualifying period starts again</li> </ul>
<ul style="list-style-type: none"> <li>● Break of less than 6 weeks</li> <li>● Annual leave</li> <li>● Workplace closed due to, e.g. Christmas holiday</li> </ul>	<ul style="list-style-type: none"> <li>● 12 week qualifying period paused</li> </ul>
<ul style="list-style-type: none"> <li>● Absence due to sickness</li> <li>● Jury Service</li> </ul>	<ul style="list-style-type: none"> <li>● 12 week qualifying period paused for up to 28 weeks</li> </ul>
<ul style="list-style-type: none"> <li>● Pregnancy and maternity-related absence</li> <li>● Statutory maternity, paternity or adoption leave</li> </ul>	<ul style="list-style-type: none"> <li>● 12 week qualifying period keeps running</li> </ul>

### CHANGE OF CIRCUMSTANCE

- If an agency worker changes agency within the 12 week period, but remains doing the same role for EDC, this does not affect qualification
- An agency worker can also provide work through more than one agency at the same time, which may result in more than one qualifying period running at the same time
- The 12 week qualifying period is also dependent on the agency worker performing the same role within that time period. If the worker's role is to change within this period the duties of the new role must be deemed to be substantially different otherwise the 12 week qualifying period still remains in place. Comparison of Role Profiles will determine whether the duties are substantially different

An example of some of the factors which should be considered in establishing if the role is substantively different are, for example,

- The pay rate is different
- The working hours are different
- Different skills and competencies are to be used
- The role requires a specific qualification that was not previously required

### **WHAT TO DO IF CIRCUMSTANCES CHANGE?**

In the situation that the new role is substantively different the employer must notify the Agency of this, in writing. The Agency must then provide the worker with a description, in writing, of the new role and notify the worker that the 12 week qualifying period will then start again.

### **RELEASE OF AGENCY WORKERS**

Agency workers can be released before the end of the 12 week qualifying period, or assignments can be for periods of 12 weeks only.

However, care should be taken that a pattern is not built up which could be seen to be a deliberate attempt to avoid the completion of the qualifying period, as provisions are included within the Regulations to counter avoidance techniques.

### **DAY 1 RIGHTS**

Although there is a 12 week qualifying period for certain factors, there are also some factors that the agency worker will be entitled to from Day 1, as listed below:

Employers must ensure that agency workers are able to access all collective facilities where available, for example,

- Canteen facilities
- Employee facilities
- Toilets/shower facilities
- Car parking
- Food/drinks machines

Agency workers should also be able to access information regarding the Council's job vacancies, from the first day of their assignment.

Agency workers should be treated no less favourably than a comparable worker or employee. The Comparator would be someone who is:

- An employee or worker
- Working for and under the supervision and direction of the employer
- Engaged in the same work, or that of a broadly similar nature
- Based at the same establishment (except in respect of access to vacancies – there would be practical difficulties regarding those who may be based in different locations)

### **BODIES REPRESENTING AGENCY WORKERS**

Agency workers will count towards the agency's workforce and not the client's, regarding employee representation.

### **EDC: ADDITIONAL DUTIES**

Agency workers can ask for information relating to their equal treatment entitlements if they believe their entitlements under the Regulations have been infringed. The requirement to provide information regarding Day 1 entitlements is the responsibility of EDC and can be requested at any time after the start of the assignment. If

any difficulties are not resolved informally then the agency worker can submit a written request to EDC, and EDC has 28 days to respond in writing from the date of receipt.

The written response should include information regarding the rights of a comparable worker or employee, and the reason for the treatment of the agency worker. These requests should also be recorded on the 'Agency Worker request form', by HR Service Support.

The Regulations also provide that where there is a statutory obligation to provide information on the employment situation, e.g. TUPE situations, information should also be provided on the use of agency workers. This information must include the total number of agency workers engaged; the areas of business in which they are resourced, and the type of work they undertake.

### **AGENCY: ADDITIONAL DUTIES**

If the information requested is in relation to entitlements after the 12 week qualifying period then this is the responsibility of the agency, and the agency worker can request this information after the 12 week period has elapsed. The agency worker can request written details from the agency regarding aspects of equal treatment that they do not believe they were receiving, before making a claim.

The agency has 28 days to respond in writing, from receipt of the request. The response should detail information relating to basic working and employment conditions; information considered in determining the basic working conditions, and information describing the differences in terms and conditions applicable to the comparable employee if equal treatment has been based on this.

An agency worker can write to EDC to request the same information if the agency has not provided them with this within 30 days. EDC then has 28 days from receipt to respond.

### **AGENCY WORKERS: CORPORATE APPROACH**

Whilst recruitment procedures and established resourcing methods are recognised, circumstances do arise whereby service delivery requirements will mean that immediate solutions need to be put in place in order to continue effective service delivery.

The process for all use of Agency Resources is as follows:

- **Step 1:** Requests must be authorised by the Head of Service, using the relevant pro forma and vacancy control processes, stating clearly the reason for the requirement for the agency worker.
- **Step 2:** Redeployment or Displacement should be considered, followed by internal and external recruitment, and only if these options have been exhausted should Agencies be considered
- **Step 3:** This resource should be arranged by the Service, with the relevant agency from the Framework Suppliers List.
- **Step 4:** If agency resource is arranged by the Service, then the pro forma must be sent to HR Service Support for recording and monitoring purposes. This should be done using the pro forma spreadsheet which should then be merged and sent to HR Service Support. A paper copy should also be printed and sent, with Head of Service signature for authorisation and vacancy control approval.

***All agency resources must be selected from Frameworks listed by Procurement.***

### **MONITOR AND REVIEW PROCESSES**

- **Step 5:** If an agency worker is hired, then recording must be undertaken. Details of agency resources must be forwarded to HR Service Support and these details then need to be audited and monitored on a regular basis before the 12 week qualifying period is reached.

***Subjective Code 180070 should be used by managers/team leaders for invoice coding purposes for all Agency workers.***

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It is the responsibility and accountability of individual services to inform HR Service Support of continuation or termination of an agency worker.

Agency Workers need to be monitored to ensure that they are not working alone unaccompanied if not Disclosure checked, if these requirements are applicable to the role.

- **Step 6:** Corporate Finance will provide a report on a monthly basis to HR Service Support, detailing payments made to agencies within that period. This will then be reconciled by HR Service Support, to details held on their monitoring database. Any discrepancies highlighted will be queried with the relevant managers/team leaders.

### **To Note**

The Subjective Code to be used for the purposes of recording agency costs will be **180070 which will have the narrative of 'agency payments'**. Any 'other employee costs' should now be coded against 180090.

## **PROCESSES FOR COMMUNICATION: EDC AND AGENCIES**

**Step 7:** Appropriate liaison with the agency must take place, as the agency must record details for each vacancy that it receives from East Dunbartonshire Council.

**Step 8:** After the 12 week qualifying period is reached EDC must provide the agency with the following details:

- The level of basic pay, based on the annual salary an agency worker would have received if recruited directly
- If and when there are overtime payments and any shift allowances
- Details of performance appraisal and information on annual pay increments
- Annual leave entitlement

The agency will also have to liaise with East Dunbartonshire Council regarding any annual pay increments, to ensure that the agency worker receives the correct pay entitlements. This process ensures that legislative accountabilities and audit requirements are fulfilled.

### **Additional Key Processes:**

- Day 1 entitlements are the responsibility of East Dunbartonshire Council, however the agency may request details of the facilities provided, and how information on job vacancies is provided. This should be provided to the agency worker in the form of an induction, and confirmation of this included in the 'Agency Worker request form' for recording purposes.
- Services should include the following points in their first day induction with agency workers (where appropriate):
  - Details of canteen facilities
  - Toilets/shower facilities
  - Car parking facilities
  - Food/drinks machines
  - Access to current EDC vacancies
- Job Vacancies on the My Job Scotland Portal and all other means of advertising will reflect that agency workers are eligible to apply, and not restricted to permanent and temporary employees.

***These guidelines will be updated on the basis of feedback and as the regulations are embedded in practice***

## Agency Workers Regulations 2010 Process Flowchart – Service arranging resource

