

# Employment Agencies, Recruitment Agencies and Agency Workers

A Practical Guide to the Law

Manus Egan, Barrister, Thomas More Chambers

Michael Smith, Barrister, Thomas More Chambers



Published by LexisNexis

LexisNexis  
Regus  
Terrace Floor  
Castlemead  
Lower Castle Street  
Bristol BS1 3AG

Whilst the publishers and the author have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of particular transactions are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

© RELX (UK) Limited, trading as LexisNexis 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 78473 229 5

Typeset by Letterpart Limited, Caterham on the Hill, Surrey CR3 5XL

Printed in Great Britain by Hobbs the Printers Limited, Totton, Hampshire SO40 3WX

# CONTENTS

Table of Cases	xvii
Table of Statutes	xxi
Table of Statutory Instruments	xxix
Chapter 1	
Introduction	1
Chapter 2	
The Statutory Regulation of Employment Agencies and Employment Businesses	3
2.1 Introduction	3
2.2 Definitions	3
What is an employment agency?	3
What is an employment business?	4
Employment agency and employment business	5
Exclusions from the Regulations	6
Work-seeker and work-finding services	7
Hirer	8
Connected	8
Notice and communication	10
2.3 Transitional provisions	10
2.4 Agreement of terms between employment businesses and work-seekers	11
2.5 Agreement of terms between employment agencies and work-seekers	14
Additional terms for including work-seeker information in publications	15
2.6 Agreement of terms between employment businesses and hirers	17
2.7 Prohibition on requiring work-seekers to use additional services	17
2.8 Prohibition of detrimental treatment when work-seeker works elsewhere	19
2.9 Restriction on providing work-seekers in industrial disputes	20
2.10 Restrictions on fees for work-seekers	21
Exceptions to the prohibitions	22
Schedule 3 work-seekers	22
Fees for inclusion of information on work-seekers in publications	23

	Company work-seekers	26
2.11	Restrictions on charges to hirers	27
	Purpose	27
	Transfer fees	27
	Introduction but no supply	27
	Introduction and supply (temp-to-perm and temp-to-temp)	28
	Introduction of work-seeker to third party by hirer (temp-to-third party)	29
	Prohibition on enforcing transfer fees	30
2.12	Restriction on employment agencies paying work-seekers' remuneration	30
2.13	Prohibition on employment businesses from withholding payment to work-seekers on certain grounds	31
2.14	Pre-introduction requirements	32
	Hirer information	33
	Work-seeker vetting requirements	33
	Additional requirements where work-seekers to work with vulnerable persons	34
	Employment agency and employment business duties where	

	Preservation of client account records	60
2.25	Records	60
2.26	Enforcement	63
	Severability	63
	Civil liability	63
	Criminal liability	64
	Prohibition orders	65
2.27	Review	65

### Chapter 3

#### The Maritime Shipping Recruitment Agencies and Employment

	Agencies Regulations	67
3.1	Introduction	67
3.2	Definitions	68
3.3	Scope	71
3.4	The seafarer employment agreement	72
3.5	Duty on employment agencies as regards seafarer employment	73
3.6	Duty as regards seafarer employment agreements	73
3.7	Duty to provide financial system of protection	74
3.8	Record keeping requirements	74
3.9	Work-seeker records	75
3.10	Hirer records	76
3.11	Statutory enforcement	77
3.12	Review	78

### Chapter 4

#### Gangmaster and Labour Abuse

	Gangmaster and Labour Abuse	79
4.1	Introduction	79
4.2	Scope	80

	Produce workers	94
	Other exclusions	95
4.6	Definitions	96
	Work-finding services	96
	Employee	96
	Connected person	96
	Notices	97
4.7	Fit and proper	98
	Obligation to provide information	99
	Inspection of the business	99
4.8	Agreement of terms between licence holders and workers	100
4.9	Agreement of terms between licence holders and labour users	102
4.10	Prohibition on pre-conditions	103
4.11	Prohibition of detrimental treatment relating to workers working elsewhere	103
4.12	Restriction on providing workers in industrial disputes	104
4.13	Restriction on licence holders paying workers' remuneration	105
4.14	Restrictions on charges to labour users	105
	Purpose	105
	Transfer fees	106
	Introduction but no supply	106
	Introduction and supply (temp-to-perm and temp-to-temp)	107
	Introduction of worker to third party by labour user (temp-to-third party)	107
	Prohibition on enforcing transfer fees	108
4.15	Fee restrictions	108
4.16	Prohibition on withholding payment to workers	108
4.17	Notification of charges	109
4.18	Pre-introduction requirements	110
	Labour user information	110
	Worker vetting requirements	111
	Steps to be taken for the protection of the worker and the labour user	112
	Ongoing vetting requirements	112
4.19	Information sharing requirements	113
4.20	Workers required to live away from home	115
4.21	Workers required to travel	115
4.22	Records	116
4.23	Gathering shellfish conditions	117
4.24	Enforcement	118
	Severability	118
	Civil liability	119
	Criminal liability	119
	Licensing regime	120
Appendix		121
Application of the Gangmasters (Licensing) Act 2004 to Northern Ireland		121

Chapter 5	
The Gangmaster Labour and Abuse Authority Licensing Scheme	127
5.1	Introduction 127
5.2	Who needs a licence? 128
5.3	Applying for a licence/licence fees 128
5.4	Assessing compliance 130
	Inspection 130
	Scoring system 132
5.5	Criminal offences 133
5.6	Licensing standard 1: fit and proper test 134
	Fit and proper 134
	Principal authority competency test 135
	Correcting additional licence conditions 135
	Change in details 136
5.7	Licensing standard 2: pay and tax matters 136
	Pay as you earn, national insurance and value added tax 136
	Paying wages 137
	Benefits 137
	Payslips 137
5.8	Licensing standard 3: forced labour and mistreatment of workers 137
	Physical and mental mistreatment 137
	Restricting a worker's movement, debt bondage and retaining ID documents 138
	Withholding wages 138
5.9	Licensing standard 4: accommodation 139
	Quality of accommodation 139
	Licensing of accommodation 141
	Situations where workers are provided with travel or required to live away from home 141
5.10	Licensing standard 5: working conditions 142
	Rest periods, breaks and annual leave 142
	Working hours 142
	Providing workers in industrial disputes 142
	Confidentiality 142
	Disciplinary and grievance procedures 143
	Discrimination 143
5.11	Licensing standard 6: health and safety 143
	Assigning responsibility and assessing risk 143
	Instruction and training 144
	Safety at work 144
	Transport 145
	Using workers to gather shellfish – planning and permission 145
	Using workers to gather shellfish – getting to the work area 146
	Using workers to gather shellfish – lifejackets and life rafts 147
	Using workers to gather shellfish – use of boats 147
	Using workers to gather shellfish – shellfish gathering permits and licences 147







8.4	Agency workers and end-users	230
8.5	Express contractual terms versus implied contract	244
Chapter 9		
The Agency Worker Regulations		249
9.1	Introduction	249
9.2	Definitions – to whom do the Regulations apply?	249
	Temporary work agencies	249
	Regulation 4	249
	Agency workers	250
	Regulation 3	250
	Hirer	253
9.3	Who is not covered by the Regulations?	253
	Professional relationships	253
	Permanent workers	253
	In-house staffing banks	254
	Service contracts	254
9.4	Rights – what rights do the 2010 Regulations give those covered?	254
	Qualifying period	255
	Regulation 7	255
	How the 12-week period is calculated	257
	When does the 12-week stopwatch reset?	257
	When does the 12-week stopwatch pause?	258
	Sickness or injury: reg 7(8)(b)	259
	Ordinary leave: reg 7(8)(d)	259
	Jury service: reg 7(8)(e)	259
	Temporary cessation in the need for the worker:	
	reg 7(8)(f)	259
	Strikes and workplace action: reg 7(8)(g)	259
	When does the 12-week stopwatch continue to run during a break?	259
	Can employers get around the 12-week qualifying period?	260
	Regulation 9	260
9.5	Day 1 rights	262
	Right of access to collective facilities and amenities	262
	Agency Worker Regulations, Regulation 12	262
	Right to information on job vacancies	264
	Regulation 13	264
	Comparable workers	265
9.6	12 week rights – basic working and employment conditions	266
	Pay	269
	Permanent contract exception	271
	Regulation 10	272
	Regulation 11	273
	Working time, rest periods and annual leave	274
	Pregnant agency workers	275
	Employment Rights Act 1996	275

9.7	Claims at the employment tribunal	281
	Grounds for a claim	282
	Regulation 17	282
	Regulation 18	283
	Regulation 19	285
	Regulation 20	286
9.8	Who is liable for breaches?	287
	Regulation 14	287
	Regulation 15	288
9.9	Right to receive information	289
	Regulation 16	289
Chapter 10		
	Discrimination against Agency Workers	291
10.1	Introduction	291
10.2	UK discrimination law	291
	The protected characteristics	291
	Direct discrimination	292
	Indirect discrimination	292
	Harassment	293
	Victimisation	294
	Disability discrimination: duty to make reasonable adjustments	294
	Genuine occupational requirement defence	297
	Justification	298
10.3	Discrimination by employers against agency workers	298
	Introduction	298
	Who is a contract worker?	299
	Contractual chains	302
	Maternity leave cases	303
	Comparators	304
10.4	Employment service-providers	305
	Introduction	305
	Who is an employment service-provider?	305
	What amounts to vocational training and vocational guidance?	306
	The prohibitions	307
	Occupational requirement exception	308
	The duty to make reasonable adjustments	309
Chapter 11		
	Agency Workers and Public Interest Disclosure	313
11.1	Introduction	313
11.2	Who is a worker?	313
11.3	Qualifying disclosure	318
11.4	To whom the disclosure can be made	319
11.5	Remedy	321

Chapter 12

Other Statutory Rights Applicable to Agency Workers	323
12.1 National minimum wage	323
Agency worker entitlement	323
National Minimum Wage Act 1998, s 1	323
National Minimum Wage Act 1998, s 34	324
National Minimum Wage Act 1998, s 54	324
What counts as pay for calculating the minimum wage?	326
12.2 Working Time Regulations 1998	327
Applicability to agency workers	327
Regulation 2	327
Regulation 36	327
Maximum working hours	328
Regulation 4	328
Regulation 5	328
Maximum night work	329
Regulation 6	329
Daily rest	330
Regulation 10	330
Weekly rest breaks	330
Regulation 11	330
Daily rest breaks	330
Regulation 12	330
Annual leave	331
Regulation 13	331
12.3 Statutory sick pay	332
Social Security Contributions and Benefits Act 1992, s 151	333
Social Security Contributions and Benefits Act 1992, s 152	334
Social Security Contributions and Benefits Act 1992, s 153	334
12.4 Maternity rights	335
Maternity leave	335
Statutory maternity pay	336
Social Security Contributions and Benefits Act 1992, s 165	338
Social Security Contributions and Benefits Act 1992, s 166	338
12.5 The right not to have wages deducted	339
The right	339
Employment Rights Act 1996, s 13	340
Employment Rights Act 1996, s 14	341
Meaning of 'wages'	342
Employment Rights Act 1996, s 27	342
12.6 The right to be accompanied at disciplinary and grievance hearings	344
Employment Relations Act 1999, s 10	344

Chapter 13	
Vicarious Liability for the Acts of Agency Workers	347
13.1 Introduction	347
13.2 Employer liability at common law	347
13.3 Vicarious liability for the acts of temporary workers	347
13.4 Discrimination, agency workers and vicarious liability	353
Chapter 14	
The Taxation of Agency Workers	355
14.1 Introduction	355
14.2 When do the agency worker provisions apply?	356
14.3 Application of the tax legislation to agency worker remuneration	356
14.4 When do the agency worker provisions not apply?	358
14.5 Supervision, direction or control	358
14.6 Record keeping requirements	361
14.7 Anti-avoidance provisions	363
Provision of fraudulent documents by client to agency	363
Arrangements seeking to circumvent liability under the agency worker provisions	364
14.8 Multiple agency/foreign agency arrangements	365
14.9 NICs provisions	366
14.10 Oil and gas sector	367
14.11 Personal service companies and managed service companies	367
14.12 Personal service companies	369
When do the IR35 provisions apply?	369
The deemed employment payment	371
Meaning of 'associates'	372
Calculating the deemed employment payment	372
Payment or benefit	374
Application of the tax legislation to the deemed employment payment	374
Claims for relief	375
Multiple intermediaries	376
14.13 Managed service companies	377
What is a MSC?	377
Meaning of 'associate'	379
The deemed employment payment	380
Calculation of the deemed employment payment	380
Application of the tax legislation to the deemed employment payment	381
Claims for relief	382
Recovery from other persons	382
MSC profits: deduction of deemed employment payments	382
Travel and subsistence expenses of workers engaged through employment intermediaries	383

Appendix	
Useful Contacts	385
The Employment Agency Standards Inspectorate	385
The Gangmasters and Labour Abuse Authority	385
GLAA appeals	386
Complaints in relation to Gangmasters' Appeals	387
Index	389